In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOSEPH MEEHAN,
RESPONDENT.

Petition for a Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

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Opinion Below.

The opinion of the court below (App. B) is reported at Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527.

Jurisdiction.

The judgment of the court below was entered on March 19, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

1. Whether the court below applied correct constitutional standards in holding a confession to be involuntary under the Fifth Amendment in the absence of any evidence of actual coercion?

2. Whether real evidence obtained pursuant to a search warrant based upon an illegally obtained confession need be suppressed where the police had other legally obtained evidence to support the warrant?

3. Whether a spontaneous inculpatory statement by the respondent to his mother need be suppressed as a product of the initial illegally obtained statement?

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual

service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1.

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

On August 11, 1976, the Suffolk County grand jury indicted Joseph Meehan for the murder of Mary Ann Birks. Prior to trial, the respondent moved to suppress inculpatory statements which he had made and articles of his clothing. After a pretrial hearing, the judge filed a memorandum of decision granting the motion in part and denying it in part, suppressing statements made to the police and a pair of pants seized pursuant to a search warrant and allowing a statement made by the respondent to his mother. The Commonwealth and the respondent then applied for leave to take interlocutory appeals pursuant to Mass. Gen. Laws, c. 278, § 28E. The applications were granted by a single justice of the Supreme Judicial Court.

On appeal, the Supreme Judicial Court affirmed the order granting suppression but reversed the denial of the respond-

ent's motion to suppress his statement to his mother. *Commonwealth* v. *Meehan*, Mass. , 387 N.E. 2d 527 (1979).

Statement of Facts.

The body of the victim was found on the front lawn of a home in the Hyde Park section of Boston in the early morning hours of June 11, 1976. Her face and head were covered with blood and a large rock found nearby was also bloodied. Police officers immediately attempted to interview people who lived in the vicinity or were known to have been at Cleary Square, a nearby gathering place, on the previous night. Mary Crowley, a neighbor, told the police in a taped interview that she had been awakened at approximately 2 A.M. on that morning. She heard a woman scream, "Don't. Please don't," and then scream wordlessly. Mrs. Crowley's daughter, Claire Wilde, who was also staying at that address, corroborated Mrs. Crowley's account and added that she, Wilde, had looked out the window and seen a white male walk by the house. Although she did not see his face, she described him as about five feet ten inches, dark-haired, slender, in his mid-twenties, and wearing faded jeans, with the sleeves of his shirt rolled up. The man returned a few minutes later, she said, and Mrs. Wilde heard the sound of a large boulder being thrown on the lawn.

Later in the morning the police interviewed, at the Hyde Park police station, four persons who had been in Cleary Square the previous evening. One of them, Joseph Ventola, who was acquainted with the victim, said that he had seen her around midnight on the steps of Christ Church at 1220 River Street. With her was a man whom Ventola described as being in his late teens, skinny, dark-haired and shirtless. A second

witness, John Carroll, said that he had seen the victim on the church steps and that she was with Joseph Meehan, whom he knew. Carroll described Meehan as eighteen or nineteen years old, dark-haired, and wearing a print shirt with rolled-up sleeves and sneakers.

During the course of Carroll's interview, he looked out the window of the first floor room in the police station and saw the respondent on Hyde Park Avenue. He pointed him out to the police officers. Detective Solari passed through the open first floor window to the street and officers Cannon and Russo went out the front door. Russo proceeded up the street on foot and Solari and Cannon came in a cruiser. Officer Cannon told the respondent they were investigating an assault and that they had been told he had been in the vicinity on the previous evening. They asked the respondent if he would accompany them to the station for an interview. The respondent said he was willing to go, but expressed concern that he would be late for an appointment to pick up his unemployment check. The officers said that they would drive him, should he be delayed. The respondent thereupon opened the cruiser door and sat down in the back. The respondent was 18 years old, five feet six inches, and was wearing a print shirt with the sleeves rolled up and cut-off dungarees.

The respondent was taken to the station, where he was interviewed by Detective Solari. Solari noticed red stains on the respondent's sneakers. When Solari asked him about them, the respondent explained that it was probably mud. Solari suggested that it looked like blood. The respondent then said that the stains were from a fight he had been in several days earlier with a George Quish. Solari asked to see the sneakers and the respondent gave Solari his left sneaker. Solari took the sneaker, left the room, and showed it to Sergeant Feeney, who agreed that there were blood stains. (A subsequent chemical test showed that the stains were blood.) Quish, who was also

being interviewed in the station at the same time, said he had not been in a fight recently. Feeney then told Solari to arrest the respondent and give him his *Miranda* warnings, which he did.

Later that morning, at about 11:20 A.M., the respondent was passed on to Sergeant Kelley, with Officers Feeney, Russo, and Madden present. Kelley told the respondent that the victim was dead and that the respondent was under arrest. Kelley again gave the respondent his *Miranda* warnings, and the respondent acknowledged each part of the warnings by saying "yes" or "right." The respondent admitted that he knew the victim and had spoken with her on the preceding Tuesday.

Kelley then informed the respondent that the sneaker had tested positively for blood. The respondent again spoke of his fight with Quish, but Kelley told him that the stains were fresh.

Kelley then informed respondent that two witnesses had seen him on the steps of the church the previous evening and that both witnesses knew the respondent. Kelley referred to the witnesses several times in the course of his interrogation and told the respondent that the police had a good case. The respondent admitted that he and the victim had been together on the church stairs the night before, but said they parted soon afterward. The respondent also said that he was high and had taken 15 Valium pills and had drunk a "few six-packs" of beer.

The respondent then asked what effect on the case his confessing would have. Kelley told the respondent that if he confessed, he could make no promises, and could only let the court know that the respondent had cooperated. Kelley indicated that, when a defendant told the truth, "the court looks upon [such] cases . . . a lot better than when we have to prove it the hard way." He also added that he thought the truth would make a good defense in the respondent's case. Kelley then

described extenuating factors to the respondent, i.e., his intoxication, and also queried if the victim had provoked him. Continuing his questioning, Kelley asked about the circumstances of the previous evening. The respondent answered questions which indicated that he and the victim had gone to 40 Oak Street together, that the victim had refused to have sexual intercourse with him, that he became enraged and kicked her in the face and head several times, knocking her unconscious, that he left, found a large rock, and returned and threw it on the unconscious victim. After the confession, the respondent asked if he had been "railroaded" into a conviction and Kelley assured him no.

That afternoon, based on the confession and the statements of the witnesses Claire Wilde and John Carroll, Officer Solari applied for a warrant to search the respondent's house for the dungarees he had been wearing. The dungarees and a pair of undershorts were recovered in the search.

At approximately 3:45 P.M. that afternoon, after being informed of the respondent's situation, the respondent's mother and brother arrived at the police station. They were told that the respondent had already confessed and were escorted to his cell. Officer Feeney testified that when the respondent saw them he began to cry and said, "Ma, I didn't mean to hit her so hard." The respondent and his mother said that the respondent merely said, "I'm sorry, Ma." The mother and brother then advised the respondent to say nothing to the police.

The police officers testified that at all times, from when the respondent was first spoken to on the street, he appeared steady on his feet, his eyes were clear, his speech was not slurred, and he responded to conversations and questions coherently.

At the pretrial hearing, the respondent filed a motion to suppress his confession. Attached to the motion was the respondent's affidavit alleging that on June 10, 1976, at approx-

imately 9 P.M. he ingested approximately 20 Valium tablets; that on June 11, 1976, at approximately 8:30 A.M. he ingested three or four additional Valium tablets; and that on June 10, 1976, between 6 P.M. and 11 P.M. he drank approximately 12 beers. He further alleged that he did not remember all the questions asked or the answers given during his interrogation.

The respondent testified that during Thursday, June 10, 1976, he intermittently consumed various quantities of beer and marijuana. He also testified that he purchased 20 Valium tablets, and swallowed a handful. He further testified that the next morning he swallowed the rest of the Valium, about four; that he had used heroin since the age of fourteen and had also used Valium in excessive quantities when heroin was not available, and that he had also drunk beer and smoked marijuana. The respondent alleged that he did not remember kicking Miss Birks in the head five to ten times or telling the police that he had.

Dr. Greenblatt, the defense's expert witness, testified that the observable effects of an excessive dose of Valium are difficulty in walking, slurring of speech, and impairment of memory, judgment and intellectual function. Dr. Greenblatt also testified that by 11:30 A.M., twelve, thirteen, or fourteen hours after ingestion, the effects of Valium cannot be stated with certainty because they wear off. He further testified that it is impossible to predict for any individual how profound the effects of Valium will be, and impossible to predict how much residual effect there would be from drugs ingested a previous night. On cross-examination, Dr. Greenblatt testified that tolerance of the drug develops after chronic and habitual use. He further testified that the effect of tolerance is to reduce the intensity and duration of the effects of the drug upon the user.

The Commonwealth's expert witness, Dr. Robert Sovner, agreed with Dr. Greenblatt both as to the effects of Valium and as to the development of tolerance to the effects after

prolonged habitual use. He added that Valium is primarily used in psychiatry to alleviate symptoms of anxiety. He also testified that the peak effects of the largest doses of Valium are reached within two hours after ingestion. After listening to the tape of the respondent's confession, Dr. Sovner concluded that the respondent was, at the time of his statement, alert, oriented and self-possessed.

Reasons for Granting the Writ.

I. The Decision of the Supreme Judicial Court Satisfies The Finality Requirement of 28 U.S.C. § 1257(3).

Under Massachusetts law,[1] an interlocutory appeal from an order of the Superior Court determining a motion to suppress may be taken by either the Commonwealth or the defendant. In the instant case, both parties sought relief from the order of the Superior Court and the matter was decided by the Full Bench. The decision of the court, while not technically satisfying the "final judgment" rule, does fall within the limited category of cases in which this Court has found the requisite finality for the purposes of § 1257(3), even though additional proceedings on the merits were anticipated in the lower court. It is suggested that the decision of the court below holding that a confession, a subsequent admission and certain physical evidence seized pursuant to a warrant must be suppressed at trial because violative of the Fifth Amendment creates a situation which falls within that category of cases outlined in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

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[1] Mass. Gen. Laws, c. 278, § 28E (App. A).

In the instant case, the decision of the Full Bench is final and conclusive, regardless of the outcome of the trial, if such trial is possible given the current ruling. This is the situation addressed in *Cox*:

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481.

California v. *Stewart*, 384 U.S. 436 (1966), epitomizes this category. In taking jurisdiction, the Court stated:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

The Commonwealth would be similarly precluded from appeal should the respondent be tried and acquitted. In addition, the decision of the Supreme Judicial Court carries with it a greater degree of finality than did the decision of the California court in *Stewart*, which had not finally excluded the challenged confession, but had "left the State free to show proof of a waiver." *Miranda* v. *Arizona*, 384 U.S. 436, 525 (1966) (Harlan, J., dissenting). No such further litigation of the issue is left to the Commonwealth in the instant case.

Moreover, a pretrial order suppressing evidence which has been reviewed and conclusively decided by the highest court of the state falls within, it is suggested, the so-called "collateral order" exception to the final judgment rule enunciated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[2] In *Cohen*, the Court recognized that there are some judgments which fall into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Id.* at 546. See also *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977).

In the instant case, the ultimate issue to be determined is the guilt or innocence of the accused. The issue sought to be reviewed here (and only capable of review here and now) is whether certain evidence must be excluded from the trial of the ultimate issue.

Therefore, the Commonwealth urges this Court to apply to the instant case the pragmatic approach to the finality require-

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[2]The reasoning of *Cohen* has been applied to criminal cases. *Stack* v. *Boyle*, 342 U.S. 1 (1951).

ment applied in *California* v. *Stewart*, and to grant review of the federal issue presented herein — an issue which will not survive the remand ordered by the Supreme Judicial Court, whatever the result of the further proceedings.

II. The Supreme Judicial Court has Applied Incorrect Standards of Constitutional Law in Determining the Voluntariness of a Confession.

The Commonwealth suggests that this Court should review the voluntariness of the confession[3] because the court below has imposed upon the prosecution, as a matter of federal constitutional law, greater restrictions on the questioning of suspects than is required by either the Fifth Amendment or this Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966). This the state court may not do. *Oregon* v. *Hass*, 420 U.S. 714 (1975).

Moreover, the court below, while correctly examining the "totality of the circumstances" in reaching a determination as to voluntariness, based its finding of involuntariness solely on the presence of factors which are not in themselves coercive. The court concluded:

> "To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assist his defense." Mass. Adv. Sh. (1979) 710, 727. (App. B, 18a.)

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[3] It is open to this Court, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court. *Brewer* v. *Williams*, 430 U.S. 387, 404 (1977).

However, such factors are not in themselves coercive, but are "relevant only in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U.S. 346; *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Davis* v. *North Carolina*, *supra*." *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971). Indeed, these factors, on analysis, would add little weight to evidence of actual coercion, were there such evidence. The respondent was not a juvenile. While he had a poor educational background, he had graduated from the ninth grade and had attended two years of high school. While he was not specifically informed of his right to use a telephone, he was twice given his full warnings as required by *Miranda* and responded that he understood. That the respondent voluntarily ingested alcohol and Valium the night before he made the statements in question and took a small amount of Valium several hours before the interrogation, while relevant, does not automatically invalidate a waiver (*Commonwealth* v. *Hooks*, Mass. , Mass. Adv. Sh. (1978) 1356, 376 N.E. 2d 857), let alone automatically render a statement involuntary. Moreover, apart from testimony in answer to a hypothetical question that some impairment in judgment and intellectual function might result from the drugs and alcohol ingested by the respondent, there is nothing, except the respondent's self-serving testimony, to indicate that he was to any material extent incapacitated. Cf. *Townsend* v. *Sain*, 372 U.S. 293 (1963). Moreover, to hold that the respondent's previous ingestion of drugs rendered his statement involuntary is inconsistent with the findings that the respondent *voluntarily* accompanied the police to the station and *voluntarily* gave them the sneaker.

The condition of the respondent and the circumstances of his interrogation do not begin to approximate the circumstances which have been held to require a finding of involun-

tariness. Cf. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant, insane and incompetent, confessed after 8-9 hours of incommunicado interrogation); *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant in custody for 16 days, interrogated daily).

Moreover, neither misrepresentation by the police as to the number of identifying witnesses nor the admonition to tell the truth renders a statement involuntary. *Frazier* v. *Cupp*, 394 U.S. 731 (1969); *Oregon* v. *Mathiason*, 429 U.S. 492 (1977); *United States* v. *Barfield*, 507 F. 2d 53 (5th Cir. 1975), cert. den. 421 U.S. 950 (1975); *United States* v. *Glasgow*, 451 F. 2d 557 (9th Cir. 1971).

Therefore, the Commonwealth submits that the court below did not apply the correct constitutional criteria in reviewing the issue. The Commonwealth submits that as a matter of constitutional law a finding that the will of a defendant "has been overborne" may not be maintained in the absence of evidence of actual coercion; such a finding cannot be made merely by adding together factors which are not in themselves coercive. To do so impermissibly distorts the Fifth Amendment prohibition against compelled testimony and renders it on a par with the knowing and intelligent waiver requirement of *Miranda* v. *Arizona*, 384 U.S. 436 (1966). Such an equation ignores the distinction drawn by this Court in *Michigan* v. *Tucker*, 417 U.S. 433 (1974).

Moreover, the lower court, in reaching its decision to suppress the confession, erred in requiring that the police do more than advise a defendant of his rights under *Miranda* and receive an acknowledgement and an expression of understanding from the defendant (see *Memorandum of Decision*, App. C). This approach is contrary to this Court's decision in *North Carolina* v. *Butler*, No. 78-354, U.S. , 25 Cr. L. 3035

(April 25, 1978), wherein the Court eschewed the inflexible and per se application of the exclusionary rule. It is submitted that the court below has greatly expanded on the mandates of the Constitution in reaching its decision.

III. There is No Per Se Rule Requiring Suppression of Real Evidence Seized Pursuant to a Search Warrant Based upon Statements which are Subsequently Required to be Suppressed.

A. *This Court has Never Applied the "Fruits of the Poisonous Tree" Doctrine to Fifth Amendment Violations.*

The Commonwealth recognizes that the Court has stated that, in a proper case, the rationale of *Wong Sun* v. *United States*, 371 U.S. 471 (1963), might be applicable to Fifth Amendment violations as well as Fourth Amendment violations. *Michigan* v. *Tucker*, 417 U.S. 433, 447 (1974). However, the Commonwealth suggests that where, as here, the violation is neither flagrant nor resulting from actual coercion, the case is not a proper one for such application.

Indeed, there is conflict among lower state and federal courts as to what type of violation may trigger the doctrine. See *United States* v. *Lemon*, 550 F. 2d 467 (9th Cir. 1977); *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976); *In re Appeal No. 245*, 29 Md. App. 131 (1975); *Rhodes* v. *State*, 91 Nev. 17 (1975).

Moreover, a requirement of actual coercion or intentional bad faith, as apart from skillful interrogation, is consistent with the purpose of the exclusionary rule for, as the Court has stated,

> "'The rule is calculated to prevent, not to repair. Its purpose is to deter — to compel respect for the constitutional guaranty in the only effectively available way — by removing the incentive to disregard it.' *Elkins* v. *United States*, 364 U.S. 206, 217 (1960)." *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

It follows that, in order to effectuate this purpose, some intentional bad faith conduct must be involved for sanctions in this case to have future effect.

Moreover, the court below ignored the distinction between the Fifth Amendment bar as to compelled "testimony" and "real" evidence obtained through compulsion. *Keister* v. *Cox*, 307 F. Supp. 1173, 1176 (W.D. Va. 1969). See also *Schmerber* v. *California*, 384 U.S. 757 (1966).

The Commonwealth submits that the application of the *Wong Sun* doctrine by the Supreme Judicial Court violates the rationale of *Michigan* v. *Tucker*, *supra*, and has the effect of requiring that police officers conducting good faith skillful investigations make no mistakes at all.

Therefore, the Commonwealth submits that an issue of vital importance to law enforcement in general has been raised which is worthy of and ripe for decision by this Court.

B. *A Statement Obtained in Violation of Miranda v. Arizona, 384 U.S. 436 (1966), Need Not Be Excluded from All Proceedings.*

Assuming *arguendo* that the confession was elicited in the absence of a knowing and intelligent waiver of the right to remain silent (and the Commonwealth submits that this is the most drastic conclusion which could be supported by the evidence), per se application of the exclusionary rule is at odds with rulings of this Court.

In *Harris* v. *New York*, 401 U.S. 222 (1971), this Court held that a statement of an accused taken in violation of *Miranda* could be used to impeach the direct testimony of the accused at trial. The Court stated:

> "It does not follow from *Miranda* that evidence inadmissible against an accused in the prosecution's case in chief is barred for all purposes, provided of course that the trustworthiness of the evidence satisfies legal standards." 401 U.S. at 224.

Again, in *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court held admissible at trial the testimony of a witness whom the police discovered as a result of the defendant's statement which had been taken in violation of *Miranda*. See also *United States* v. *Janis*, 428 U.S. 433 (1976).

The Commonwealth submits that *Michigan* v. *Tucker*, *supra*, controls the instant case. The only significant difference involves the type of evidence to be offered at trial. In the instant case, real evidence was seized. Factors which strengthen the argument for admission here are that the real evidence carries with it greater indicia of trustworthiness than the oral testimony held admissible under *Michigan* v. *Tucker*, 417 U.S. 433 (1974), *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 250 (1973) (Powell, J., concurring), and that it was seized pursuant to an otherwise valid warrant.

Evidence, although inadmissible at trial, has traditionally been an appropriate basis for determining probable cause for a search warrant. *Spinelli* v. *United States*, 393 U.S. 410 (1969) (hearsay). The fact that the statements were later held to be inadmissible at trial (the only sanction specifically required by *Miranda* or by the Fifth Amendment) should not render them impermissible for a determination that probable cause exists

for the issuance of a search warrant. It would be particularly inappropriate to do so where, as here, the search warrant was applied for in good faith.

Applying the balancing test of *United States* v. *Janis*, 428 U.S. 433 (1976), and *Michigan* v. *Tucker*, 417 U.S. 433 (1974), compels a result contrary to that reached by the Supreme Judicial Court. The Commonwealth suggests that, in the instant case, the interest of the public in having a defendant's guilt or innocence determined on the basis of trustworthy evidence outweighs the need to deter improper police misconduct.

Where there has been no flagrant violation of either the Fifth Amendment or the prophylactics of *Miranda*, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.

"I tend generally to share the view that the per se application of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other." *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (concurring opinion of Mr. Justice Powell).

Application of the exclusionary rule is even less appropriate in the case at hand, where police officers possessed sufficient information, in addition to the confession, to obtain a search warrant. At the time of application for the warrant, the police had been informed that the respondent and the victim were seen together, that the respondent had offered contradictory explanations on the stains on his sneakers, that the sneakers were stained with blood, and that a person fitting his description had been seen leaving the scene of the murder just after the screams of a woman had been heard. Indeed, the Supreme Judicial Court conceded that the police probably had sufficient evidence to justify the issuing of the warrant.

The Commonwealth recognizes that the Fifth Amendment is implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which has been or could have been deemed to constitute an intentional attempt to deny the respondent his constitutional rights. Compare *Brewer* v. *Williams*, *supra*.

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the respondent, and the Commonwealth possessed evidence obtained independently of the illegally obtained confession.

IV. The "Cat out of the Bag" Theory does Not Require Suppression of All Statements Made Subsequent to an Involuntary Confession.

It should be noted that the respondent's statement to his mother, some four hours after his confession, to the effect: "Ma, I didn't mean to hit her so hard," or "Ma, I'm sorry," was made spontaneously, was an expression of regret, was not

elicited by any interrogation, and was not directed to the police.

This Court has never held that an inadmissible confession automatically precludes use of all later voluntary statements. *United States* v. *Bayer*, 331 U.S. 532 (1947). The "cat out of the bag" analysis requires suppression only if, after a prior coerced statement, the defendant is motivated by the belief that any effort to withhold information would be futile and that no harm can be done by repetition or amplification of his earlier statements. *Darwin* v. *Connecticut*, 391 U.S. 346 (1968). The circumstances surrounding the statement in issue clearly do not meet this standard: there was no attempt to obtain information and the statement was not repetitious of the prior confession; rather, it was a spontaneous expression of regret to a family member.

Copeland v. *United States*, 343 F. 2d 287 (D.C. Cir. 1965), provides the correct two-prong analysis. To exclude the statement it must, first, be demonstrated that it would not have been made "but for" the interrogation. Here, the respondent was placed under arrest prior to the interrogation, it is reasonable to suggest that his relatives would arrive at the police station at some point, and it is sheer speculation to assume that the respondent would not have made his spontaneous expression of regret to his mother, absent his prior confession. As the Court stated in *Copeland*, at 291:

> "Whatever the force to the 'cat-out-of-the-bag' argument in determining a nexus between two successive confessions to police, it would seem to have none as to a spontaneous, unsolicited and unexpected comment addressed only to a victim. An apology to a private citizen is a different breed of 'cat' from the kind involved in a statement to police."

Moreover, the second prong to the test is similarly missing, i.e., that the statement is a "fruit" of deliberate exploitation by police of the prior interrogation. The police in the instant situation did nothing to prompt the respondent's expression of regret to his mother.

The Commonwealth suggests that the Supreme Judicial Court has applied the exclusionary rule in a manner far beyond that which is constitutionally required or contemplated by the rulings of this Court.

Conclusion.

For the reasons stated above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

Massachusetts General Laws, Chapter 278.

§ 28E. [Appeals by Commonwealth or Defendant of Questions of Law in Criminal Cases Prior to Trial, etc.]

An appeal may be taken by and on behalf of the commonwealth by the attorney general or a district attorney from the superior court to the supreme judicial court in all felony cases from a decision, order or judgment of the court (1) allowing a motion to dismiss an indictment or complaint, or (2) allowing a motion to grant appropriate relief under the provisions of section forty-seven A of chapter two hundred and seventy-seven. On application for an appeal in a felony case by and on behalf of the commonwealth by the attorney general or a district attorney, or by the defendant, a single justice or the chief justice of the supreme judicial court may, upon determining that the administration of justice would be facilitated thereby, grant an interlocutory appeal from a decision, order or judgment of the superior court determining a motion to suppress evidence prior to trial and a single justice shall hear the same or shall report the same to the full court or to the appeals court for hearing; provided, that if such application is denied, or if such application is granted but the interlocutory appeal is heard by a single justice, the determination of the motion to suppress evidence shall be open to review by the full court after trial in the same manner and to the same extent as determinations of such motions not appealed under the interlocutory procedure herein authorized. An appeal shall be taken or an application for appeal shall be filed under this section within ten days after such order, decision or judgment has been entered, and in any case before the defendant has been placed in jeopardy under established rules of law. The appeal, or application and appeal if granted, shall be diligently prosecuted,

and trial shall be stayed pending prosecution and determination thereof.

If the appeal or application therefor is taken on behalf of the commonwealth the defendant shall be released on personal recognizance, and shall be reimbursed his costs of appeal together with reasonable attorneys' fees, subject to the approval of the court.

Rules of practice and procedure with respect to appeals authorized by this section shall be the same as those now applicable to criminal appeals under sections thirty-three A through thirty-three G, inclusive.

Appendix B.

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JOSEPH MEEHAN.

Suffolk. December 5, 1978. — March 19, 1979.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, & ABRAMS, JJ.

Constitutional Law, Admissions and confessions, Search and seizure, Waiver of constitutional rights. *Search and Seizure. Arrest. Waiver.*

Indictment found and returned in the Superior Court on August 11, 1976.

A motion to suppress evidence was heard by *Good*, J. Applications by the defendant and the Commonwealth for an interlocutory appeal were allowed by *Liacos*, J., and the appeal was reported by him.

Sandra Hamlin, Assistant District Attorney (*Paul A. Mishkin*, Special Assistant District Attorney, with her) for the Commonwealth.

Davis A. Mills (*Walter J. Hurley* with him) for the defendant.

KAPLAN, J. A Suffolk County grand jury handed down an indictment on August 11, 1976, charging the defendant Joseph Meehan with the murder of Maryann Birks. The defendant moved before trial to suppress inculpatory statements made by him as well as articles of clothing belonging to him. Extensive evidence was received on voir dire, including testimony from the defendant and medical testimony dealing with the extent to which the defendant's perceptive ability was impaired when he made the statements. The judge filed lengthy findings which grounded his order granting the motion in part and denying it in part. Thereupon the Commonwealth applied under G.L. c. 278, § 28E, for leave to take an interlocutory

appeal from so much of the order as granted suppression, and the defendant made a similar application with respect to the denial. A single justice of this court granted both applications, and we are thus required to review the several parts of the order. The order will be affirmed except for one feature which in our view merits reversal.[1]

Drawing on the findings and the underlying record, we state some of the facts at this point, reserving the rest for the later discussion of particular issues.

About 6 A.M., Friday, June 11, 1976, police officers found the victim's body on the front law of 40 Oak Street in the Hyde Park neighborhood. The face and head were covered with blood; a large rock found near the body was spotted with blood. Promptly the police attempted to interview individuals living near 40 Oak Street, or known to have been at the nearby Cleary Square (evidently a familiar gathering place) on the previous night.

Of the former group, Mary Crowley, interviewed at her home on 38 Oak Street, said that about 2 A.M. that morning she was awakened by a scream, dogs barking, and a tapping sound; she heard a woman scream, "Don't. Please don't," and then a wordless scream. Crowley's daughter, Claire Wilde, staying at the same address, gave a similar account and added that, looking out the window, she saw a white male walk by the house; he was about five feet ten inches, in his mid-twenties, had dark hair, and was slender; he was wearing faded jeans and his shirtsleeves were rolled up. Some minutes later the man returned and she heard what she described as the sound of a large boulder being thrown on the lawn. She

[1] The defendant has not briefed or argued certain assignments of error and they are considered waived. S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974). See *Commonwealth* v. *Watkins*, Mass. , & n.2 (1978) (Mass. Adv. Sh. [1978] 1646, 1647, & n.2), and cases cited; Mass. R. A. P. 16, as amended, 367 Mass. 921 (1975).

did not see the man's face. The statements of these two witnesses were recorded on tape.

Also on the morning of June 11, four persons of the Cleary Square group were interviewed at District 5 police station on Hyde Park Avenue. Two gave material statements, also tape-recorded. Joseph Ventola, who knew the victim, said that around midnight he had driven past her; she was on the steps of Christ Church at 1220 River Street in the company of a white man, shirtless, in his late teens, "skinny," with dark hair. The second witness, John Carroll, said that between 11:30 P.M. and midnight he had driven by the victim and the defendant Joseph Meehan (both known to him); they were sitting on the steps of Christ Church; he described Meehan as eighteen or nineteen years old, five feet six, about 130 pounds, dark hair, wearing sneakers and a print shirt with rolled-up sleeves.

As Carroll was being interviewed about 10:30 A.M. in a first-floor room at the police station, he chanced, looking through the window near street level, to see the defendant trying to hitch a ride on Hyde Park Avenue and pointed him out to the police. Detective James Solari, one of the officers present, passed through the opened window to the street, while two other officers, William Cannon and Louis Russo, went by the front door. Russo walked up the street; Solari and Cannon proceeded in a police cruiser. The cruiser pulled up alongside the defendant. Cannon told him they were investigating an assault on a woman, were questioning those who had been seen in the area of the crime, and had been told that the defendant was there the previous evening. They asked the defendant to come with them to the station for an interview. The defendant said he was willing, but he was going to the unemployment office and did not want to be late. The officers answered they would drive him to the office if he should be delayed. The defendant opened the car door and took a rear

seat, where he was joined by the officer who had approached on foot. The defendant was eighteen, five feet six inches, 135 pounds, dark hair, wearing cut-off dungarees and a blue print shirt with rolled-up sleeves.

Officer Solari interviewed the defendant at the station. Sitting at a short distance from the defendant, Solari noticed reddish stains on the defendant's sneakers. In response to a question, the defendant said they were probably mud. When Solari said they appeared to be blood, the defendant said, if so, the stains were from a fight he had had several days earlier with George Quish. Solari asked whether he could inspect the sneakers. The defendant answered by removing the left sneaker and handing it to Solari. Leaving the defendant in the room, Solari took the sneakers and showed them to Sergeant James Feeney. Feeney agreed there were blood stains. It happened that Quish was being interviewed at the station at the same time. When asked by Sergeant Feeney whether he had been involved in a fight recently, Quish said he had not been. Feeney then instructed Solari to arrest the defendant and give him Miranda warnings, which evidently was done (there was no proof as to the manner of administering the warnings). A chemical test, made promptly, confirmed the visual judgment of blood.

About 11:20 A.M., the defendant was passed on to Sergeant Joseph Kelley (with Officers Feeney, Mark Madden, and Russo also present). Kelley gave the defendant Miranda warnings, and then followed an interrogation, interlarded with cajolings and assurances, which continued for perhaps an hour (almost all recorded on tape). Starting with his denial that he had been in the company of the victim on the night of the assault, the defendant was gradually brought around to admitting that he had kicked her, thrown a rock at her, and left her unconscious (as he thought) at the place where she was found. The circumstances of this confession were dealt with

by the judge in particular detail, and must be closely examined later in this opinion.

Mentioning the confession (and with some reference also to the statements of Claire Wilde and John Carroll previously given to the police), Officer Solari applied early that afternoon to the assistant clerk of the Municipal Court of the West Roxbury District for a warrant to search the defendant's house at 1559 River Street and recover the dungarees he was wearing (as mentioned during the confession) at the time of the alleged assault. The dungarees were in fact recovered under the warrant, as was a pair of undershorts found during the search.

The defendant's mother and brother, with Sergeant Feeney present, visited him at his cell at the District 5 station around 3:45 P.M. According to Feeney's testimony (which differed from that of the relatives), the defendant then uttered an incriminatory remark.

The judge after voir dire held (1) there was not an arrest on Hyde Park Avenue; (2) the sneakers should not be suppressed; (3) the confession should be suppressed, (4) with like consequence for the dungarees and undershorts; and (5) the statement to the mother and brother should not be suppressed. The cross-applications for interlocutory appeal followed.

In reviewing the judge's order we apply the standard recently stated, "that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for that judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but, even so, that his conclusion as to waiver is entitled to substantial deference." *Commonwealth* v. *Doyle*, Mass. , n.6 (1970) [Mass. Adv. Sh. (1979) 168, 175 n.6]. Adhering to that

standard, we see no sufficient basis for interfering with the findings or conclusions of the judge below, except as to the statement to the mother and brother which, as matter of law, must be suppressed as the product of the original confession. We reverse that part of the order and affirm the rest.

1. *The arrest.* The defendant argues initially that he was arrested at 10:30 A.M. on Hyde Park Avenue, and that there was not probable cause for an arrest at that time. If the arrest was thus illegal, he maintains, it would infect the sequelae. The Commonwealth contends, and the judge found, that there was no arrest on Hyde Park Avenue, that an arrest did not take place until about 11:15 A.M., after the sneakers appeared on inspection to be bloodied and Quish had denied the fighting. The defendant does not challenge the judge's finding that there was sufficient cause for an arrest at that time.

The judge's conclusion that the defendant accompanied the officers voluntarily, and not under constraint, is well supported. It was put to the defendant that the police were engaged in a general inquiry and were seeking cooperation: the officers asked, did not demand, that the defendant come with them; the defendant opened the car door himself and entered the vehicle without compulsion;[2] the officers yielded to his convenience by promising to drive him to his destination if he lost time. Allowing for any implications arising from the police uniform itself, we think the case for the judge's inference of nonarrest is quite as strong as it was in such instances as *Commonwealth* v. *Cruz*, Mass. (1977) [Mass. Adv. Sh. (1977) 2395], and *Commonwealth* v. *Slaney*, 350 Mass. 400 (1966), where like conclusions were reached. The situation would have been clearer if the officers had told the defendant

[2]The defendant testified that Officer Russo "had his arm on my elbow, opened the door, put me in," but the judge accepted Officer Solari's testimony that the defendant opened the door and climbed into the car himself. Officer Solari also testified that there was no physical contact between the defendant and any of the officers.

that he was free to go on his way if he chose; but this punctilio cannot be insisted on here. See *Commonwealth* v. *Cruz*, *supra* at n.3 [Mass. Adv. Sh. (1977) at 2401 n.3].

The judge seemed to be appraising the defendant's own understanding of his situation (account being taken of the defendant's mental or psychological condition at the time),[3] but we need to add that, regardless of the defendant's inner reaction, there was no arrest for the present purpose if a reasonable person on the scene would not receive the impression that the defendant was being forcibly detained — unless, indeed, the officers had reason to understand that the defendant apprehended he was confronting force, and they then did nothing to disabuse his mind. See *United States* v. *Scheiblauer*, 472 F.2d 297, 301 (9th Cir. 1973); *Seals* v. *United States*, 325 F.2d 1006 (D.C. Cir. 1963). On this view, it also appears there was not an arrest. See *United States* v. *Chaffen*, 587 F.2d 920 (8th Cir. 1978); *United States* v. *Brunson*, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842 (1977). We need not enter on a more refined subjective-objective analysis. See *State* v. *Kelly*, 376 A.2d 840 (Me. 1977); Model Code of Pre-Arraignment Procedure, Commentary to § 110.1 (1975); Cook, Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest, 19 U. Kan. L. Rev. 173 (1971).

2. *The sneakers.* The judge ruled against suppression of the sneakers on the ground that the defendant surrendered them voluntarily to the officer. In a camera's eye, that is what happened. But the defense disputes a conclusion of consent. It presses a Fourth Amendment contention that, even if not in custody, the defendant was now in a coercive setting, with a tendentious question raised and unresolved — whether the

[3]There is no inconsistency between the judge's finding of voluntariness here and his finding, discussed below, that the defendant's condition of mind was one factor which, together with others arising later, rendered his confession involuntary.

stains were not in fact blood. See *Commonwealth* v. *Harmond*, Mass. , (1978) [Mass. Adv. Sh. (1978) 2773, 2779]. The defendant was not informed that he could withhold the sneakers. See *id.*; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). Again there is the element of the defendant's mental condition at the time.

The judge's finding of voluntariness is supported, and his ruling should not be disturbed. However, another basis for the ruling is at hand. On a conventional interpretation, the articles were in "plain view," and so could have been taken in any event. For the officer, lawfully questioning the defendant, had a "legitimate reason for being present" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971); the evidence, an article appearing to be bloodstained, was "come by 'inadvertently'" or "without particular design" (*Commonwealth* v. *Bond*, Mass. , [1978]) [Mass. Adv. Sh. (1978) 1241, 1246]; and the officer could recognize it, in combination with the statements received, "to be plausibly related as proof to criminal activity of which [he was] already aware." *Id.* at [Mass. Adv. Sh. (1978) at 1247]. See *Commonwealth* v. *Moynihan*, Mass. (1978) [Mass. Adv. Sh. (1978) 2654]; *Harris* v. *United States*, 390 U.S. 234 (1968). This interpretation is in accord with decisions applying the plain view rule to the seizure without warrant of clothing or other material believed to be bloodstained and thus connected with a crime under investigation. See, e.g., *Commonwealth* v. *Perez*, 357 Mass. 290 (1970); *Smith* v. *Slayton*, 484 F.2d 1188 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States* v. *Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973); *State* v. *Hardin*, 518 P.2d 151 (Nev. 1974); *State* v. *Rudd*, 49 N.J. 310 (1967). The case of *McCorquodale* v. *State*, 233 Ga. 369, 375 (1974), cert. denied, 428 U.S. 910 (1976), parallels our facts very closely. Professor LaFave might dispute whether, in strictness, the articles here, having not been come by in the course of a lawful search, were within

the sense of the "plain view" doctrine (W.R. LaFave, Search and Seizure § 2.2 at 240-248 [1978]), but the whole going situation was one where a requirement of procuring a warrant for the sneakers would seem extravagant. Cf. *Cupp* v. *Murphy*, 412 U.S. 291 (1973).

3. *The confession.* (a) *Content.* Sergeant Kelley started his interrogation by stating that the victim was dead and the defendant was under arrest. The defendant: "I am under arrest?" (And later: "Under arrest for what?") Kelley recited the Miranda warnings, asking the defendant to acknowledge each sentence as it was recited, which the defendant did by saying "yes" or "right." Then followed questions whether the defendant knew the victim. The defendant went as far as to say that he had spoken with her the previous Tuesday, but had not gone out with her.

Sergeant Kelley changed the subject to the sneakers and said they had been tested positively for blood. When the defendant tried again to account for this by referring to a fight with Quish on Tuesday, Kelley said the blood stains were fresh, made within hours, and scouted the defendant's attempted (and weak) explanations of how the stains could appear so although made on Tuesday.

Sergeant Kelley returned to the question of the defendant's acquaintance with the victim, and now said that they had been seen together on the church steps last night by two witnesses (not named): both witnesses, he said, were sure of the identification, reliable, and had known the defendant for several years. Kelley said it was not incumbent on him to show these witnesses to the defendant, but the defendant could confirm with Feeney and Madden that they had talked to the witnesses. (Kelley referred to the two witnesses at least seven times and later added, "we are not holding you here on a little thread of evidence. We have a good case here.") The defendant proceeded to admit he and the victim were together on the church stairs about midnight, but he said they had

parted shortly afterwards. He added that he had been "high" and "whacked out" on "downers" — fifteen Valium pills (on top of a "few 6-packs").

At this point, the interrogation seems to pause and take a turn with Madden reporting a question supposed to have been raised by the defendant: If he, the defendant, told them that he did it, "what bearing would that have on the case and what degree it would be?" Kelley went forward on two lines. On the "bearing" of a confession, he spoke at some length. He indicated a number of times that he could make no promises and would only be in a position to make it known to the court and the attorneys that the defendant had cooperated and finally told the truth, and "the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way." But he went on to say: "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would." "As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case." The second line Kelley took was to indicate there were extenuating factors: he laid stress on the fact of the defendant's drunken condition and, immediately after speaking of the "good defense," elicited from the defendant a "yes" answer to a leading question about the victim's "provoking" the defendant. The defendant first expressed doubt ("I don't know"), then answered questions, many of them leading, to the effect that he and the victim had gone to the Oak Street location where the victim had refused to have intercourse with him because (as she said) he was too young; that in his drunken state he had lost control and kicked her and found a stone nearby and threw it upon her; but he did have intercourse with her, whether before or after the beating, he could not remember. Finding her unconscious, he fled. After most of the story had been elicited, the defendant asked, "Does that

mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelley: "No."

(b) *Analysis*. The judge did not base himself on a single factor, but rather on the cumulative effect of several,[4] in finding the confession "involuntary," or — to speak more accurately — in finding that the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966). The factors were: communication of incorrect information about the strength of the Commonwealth's case; assurance that the defense would benefit from a confession; defendant's unstable condition combined with his youth and inexperience; failure to inform the defendant he could telephone his family or friends.

(i) It was true that one witness, John Carroll, gave a statement that he saw the defendant and the victim sitting on the church steps on the fatal night and that he had known and recognized them both. There was, however, no second witness who gave a like statement. Officer Kelley had in fact interviewed both Carroll and Joseph Ventola and had heard Ventola say that he did not recognize the male sitting on the steps. Ventola's description of the male actually contradicted Carroll's statement in the matter of whether the male was wear-

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[4] Referring to the factors of defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the judge doubted seriously the effectiveness of the waiver of Miranda rights, but in his apparent view (which we share) the decision is better rested on those and other factors which in combination rendered the confession involuntary. (As the judge noted, there is a place in the tape of the interrogation which may be open to the interpretation that, at a point before the most serious admissions, Sergeant Kelley went on to question the defendant although the defendant had indicated that that was all he wanted ["liked"] to say. See *Miranda* v. *Arizona*, 384 U.S. 436, 474 [1966]; *Commonwealth* v. *Mitchell*, 246 Pa. Super. Ct. 132, 136 n.3 [1977]. The interpretation is dubious and again we pass to the better foundation of decision.)

ing a shirt. Officer Kelley's statements, repeatedly bracketing two witnesses as having known the defendant for years and as giving direct, mutually reinforcing identifications, were deceptive. The more general remarks about the strength of the Commonwealth's "case" served still further to give the impression that the case against the defendant was already proved. Taken alone, the misinformation would not, we think, suffice to show "involuntariness" (see *Frazier* v. *Cupp*, 394 U.S. 731 [1969]; *United States ex rel. Hall* v. *Director, Dep't of Corrections of Ill.*, 578 F.2d 194 [7th Cir. 1978]), but the judge could view it as a relevant factor in considering whether the defendant's ability to make a free choice was undermined. See *Commonwealth* v. *Jackson*, Mass. , & n.8 (1979) [Mass. Adv. Sh. (1979) 401, 413 & n.8]; *United States ex rel.* ett v. *Murphy*, 329 F.2d 68 (2d Cir.), cert. denied, 377 U.S. 967 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955); *Robinson* v. *Smith*, 451 F. Supp. 1278 (W.D.N.Y. 1978); Model Code of Pre-Arraignment Procedure, Commentary to § 140.4 (1975).

(ii) The judge could find that the police overstepped the permissible line in advising the defendant about the consequences a confession might have for the conduct of the defense.

An officer may suggest broadly that it would be "better" for a suspect to tell the truth,[5] may indicate that the person's cooperation would be brought to the attention of the public officials or others involved,[6] or may state in general terms that co-

[5] See *United States* v. *Barfield*, 507 F.2d 53 (5th Cir.), cert. denied, 421 U.S. 950 (1975); *State* v. *McLallen*, 522 S.W.2d 1 (Mo. 1975); *Bell* v. *State*, 258 Ark. 976 (1975); *Robinson* v. *State*, 229 Ga. 14 (1972); *Coursey* v. *State*, 457 S.W.2d 565 (Tex. Crim. App. 1970).

[6] See *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 99 S. Ct. 279 (1978); *United States* v. *Frazier*, 434 F.2d 994 (5th Cir. 1970); *Fernandez-Delgado* v. *United States*, 368 F.2d 34 (9th Cir. 1966); *Burton* v. *Cox*, 312 F. Supp. 264 (W.D. Va. 1970); *People* v. *Hubbard*, 55 Ill. 2d 142 (1973).

operation has been considered favorably by the courts in the past.[7] What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.[8]

Here the officer did emphasize that he could make no promises. But having said that, and uttered in addition the generalities about cooperation, he assured the defendant that a confession would "probably help your defense; in fact, I am sure it would." The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be exonerated. Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's "provocation" and by the defendant's inebriated condition at the time.

The law invoked here goes back many years. "No cases require more careful scrutiny," said this court in *Commonwealth* v. *Curtis*, 97 Mass. 574, 578 (1867), "than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions." In that case the court excluded a confession given after an assurance by a police officer that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." For other expressions of the policy, see *Commonwealth* v. *Smith*, 119 Mass. 305 (1876); *Commonwealth* v. *Taylor*, 5 Cush. 605

[7] See *United States* v. *Reynolds*, 532 F.2d 1150 (7th Cir. 1976); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971); *Wallace* v. *State*, 290 Ala. 201 (1973).

[8] See *Bram* v. *United States*, 168 U.S. 532 (1897); *Grades* v. *Boles*, 398 F.2d 409 (4th Cir. 1968); *State* v. *Setzer*, 20 Wash. App. 46 (1978); *Bradley* v. *State*, 356 So.2d 849 (Fla. Dist. Ct. App. 1978); *State* v. *William*, 33 N.C. App. 624 (1977); *State* v. *Tardiff*, 374 A.2d 598 (Me. 1977); *Robinson* v. *State*, 229 Ga. 14 (1972); *Wallace* v. *State*, 290 Ala. 201 (1973); *State* v. *Castonguay*, 240 A.2d 747 (Me. 1968); *Lyter* v. *State*, 2 Md. App. 654 (1968); *State* v. *Fuqua*, 269 N.C. 223 (1967).

(1850); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964); and for cases on either side of the line, compare *Bram* v. *United States*, 168 U.S. 532 (1897), and *State* v. *Pruitt*, 286 N.C. 442, 458 (1975), with *United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), cert. denied, 414 U.S. 1025 (1973), and *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

(iii) In the defendant's confession and affidavit on the motion to suppress, and his testimony and the testimony of others on voir dire, there was basis for questions to a medical expert called by the defense which led to the following opinion. If a person ingested ninety-five milligrams of Valium between 7:30 and 9 P.M. and between 7:30 and 11:30 P.M. drank twelve twelve-ounce bottles of beer,[9] there would be an impairment of memory, judgment, and intellectual function for at least six hours. At 11:30 the next morning, a wearing-off of the effects of the drug might be expected, "how much can't be said with certainty." If, in addition, twenty-five milligrams were taken at 10:20 A.M. that morning,[10] there would be at 11:20 A.M. "Some drowsiness, sedation, impairment of judgment and intellectual function." The same expert conceded that if a person took Valium once a week over a two-year period, some "tolerance would develop," but there was in fact no testimony that the defendant had been so regular a user. Expert testimony on the part of the Commonwealth was less suggestive of difficulties that the defendant might experience in

[9] In his affidavit the defendant stated that he took twenty five-milligram tablets of Valium at about 9 P.M. on June 10, drank about twelve containers of beer between 6 and 11 P.M. that evening, and about 8:30 A.M. on the following morning ingested an additional three or four Valium tablets. During the voir dire he added that he had smoked an unspecified quantity of marihuana on the evening of June 10.

[10] In fact the defendant said that he ingested Valium at about 8:30 A.M.; but the testimony as to the duration of the effects of the drug indicated that the one hour and fifty-minutes disparity would not make a material difference.

the morning. The defendant testified that he was dazed and confused and unable to remember much of the questioning by the police. Reading and listening to the tape of the Kelley interrogation, one finds strings of questions answered with monosyllables ("not reassuring explanations of his asserted comprehension," *Commonwealth* v. *Daniels*, 366 Mass. 601, 608 [1975]); confusion, too, in the defendant's questions about whether he was under arrest and whether he was to be "railroaded." Other answers were more forthcoming and involved some reasoning. The judge concluded that the defendant's judgment at that time was "dim" and "impaired." If it should be assumed that this condition would not alone justify suppression of the admissions (compare *Commonwealth* v. *White*, Mass. [1977] [Mass. Adv. Sh. (1977) 2805], aff'd by an equally divided court, U.S. [1978] [47 U.S.L.W. 4066 (Dec. 11, 1978)], with *Commonwealth* v. *Doyle*, Mass. [1979] [Mass. Adv. Sh. (1979) 168]), it would still be entitled to count in the judge's total assessment. See *Commonwealth* v. *Johnston*, Mass. (1977) [Mass. Adv. Sh. (1977) 1473]; *United States* v. *Grant*, 427 F. Supp. 45, 50 (S.D.N.Y. 1976).[11] So also the judge could give weight to the defendant's youth, inexperience, and limited schooling. See *Commonwealth* v. *Cain*, 361 Mass. 224, 228-229 (1972).

(iv) Especially in light of the defendant's youth, inexperience, and condition, a violation of G.L. c. 276, § 33A, as amended through St. 1963, c. 212, assumes importance. A person under arrest at a station with a telephone is entitled to be informed "forthwith upon his arrival . . . of his right to so use the telephone [i.e., to communicate with his family or friends], and such use shall be permitted within one hour thereafter." It has been held that unfavorable evidence, obtained as the result of an intentional deprival of the statutory

[11] See note 4 *supra*.

right, should be considered inadmissible and subject to suppression. *Commonwealth* v. *Jones*, 362 Mass. 497 (1972). We have not yet ordered suppression in a case where, although deprivation has occurred, it was not through proved intention; but we have lately again given warning of the importance of the statutory duty. See *Commonwealth* v. *Alicea*, Mass. , n.11 (1978) [Mass. Adv. Sh. (1978) 2707, 2711 n.11]. We agree with the judge that the failure affirmatively to comply with the statute is a factor in deciding whether a confession, vulnerable on other grounds, should be suppressed. Incidentally, it is clear, as will be seen below, that had the defendant called his mother or brother, they would have advised him not to speak to the police.

To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assit his defense. We should not interfere with the judge's conclusion that the confession was involuntary and inadmissible.

4. *The dungarees.* When Officer Solari presented his application for the search warrant, the police were in possession of evidence probably sufficient, apart from the confession, to justify the issuance. The application, however, omitted mention of the crucial parts of this evidence, and the Commonwealth proceeds here on the assumption that the warrant rests on the confession. So the question is raised whether the warrant can legalize the seizure of the dungarees, when it is held that the confession must be suppressed. We agree that the answer is no, and this is explained simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment. See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 892-893 (7th Cir. 1976); *United States* v. *Massey*, 437 F. Supp. 843, 861-862 (M.D. Fla. 1977). Cf. *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974); *United States* v. *Cassell*, 452 F.2d 533, 541 (7th Cir. 1971). The conclusion follows from our recent decision of *Commonwealth* v. *White*, *supra* at - [Mass. Adv. Sh. (1977) at 2812-2813], where we suggested that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized. See Model Code of Pre-Arraignment Procedure, Commentary to § 150.4 (1975).

There are cases in the Supreme Court suggesting that in certain circumstances evidence, secured as a result of a confession elicited by a violation of the prophylactic Miranda rule, need not be excluded on any constitutional ground. See *Michigan* v. *Tucker*, 417 U.S. 433 (1974). Cf. *Oregon* v. *Haas*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) (the latter case was followed in *Commonwealth* v. *Harris*, 364 Mass. 236 [1973]). Those cases do not, however, reach the present, where the confession was involuntary. This distinction has been noted by the Court.[12] We add that our position here is

[12] In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), where the Court held that testimonial evidence need not be excluded because it was obtained as a result of a confession elicited in violation of Miranda, the confession "could hardly be termed involuntary." Thus "the police conduct . . . did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*." *Id.* at 444-445. See also *Oregon* v. *Haas*, 420 U.S. 714, 722 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). After *Michigan* v. *Tucker*, some courts have expressed doubt as to whether physical evidence gathered as a result of a confession which is voluntary but obtained in violation of Miranda requirements must always be excluded as its "fruits." See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 894 n.3 (7th Cir. 1976); *Rhodes* v. *State*, 91 Nev. 17, 23 (1975). But see *Commonwealth* v. *Caso*, Mass. (1979) (Mass. Adv. Sh. [1979] 298); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (suggesting that

consistent with both the majority and minority views expressed in *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied. 425 U.S. 959 (1976).

5. *The afternoon statement.* News of the defendant's trouble did not reach his mother or brother until mid-afternoon. About 3:45 P.M. they arrived at the police station and were informed that the defendant had already confessed the crime. Sergeant Feeney and at least one other officer escorted the pair to the defendant's cell. Feeney testified that, as his visitors appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, ma." The mother and brother said loudly the defendant should say nothing to the police. The encounter was extremely emotional; the three were shouting at different points in the conversation.

In contending that any incriminating statement was consequent upon the involuntary confession and therefore similarly inadmissible, the defendant relied on the "cat out of the bag" analysis, which requires "the exclusion of a statement if, in giving the statement, the defendant was motivated by a belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements." *Commonwealth* v. *Mahnke*, *supra* at 686. See *Commonwealth* v. *Watkins*, Mass. , - (1978) [Mass. Adv. Sh. (1978) 1646, 1656-1661]; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). The judge below pointed to the following circumstances to show that the conditions of the statement were different from those of the confession and the two were thus independent: the statement was not prompted by police interrogation or made to the police (although police officers were within hearing), but was rather made to the family, and it appeared spontaneous.

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derivative physical evidence will less readily be admitted than derivative testimonial evidence).

Here we are obliged to hold that the judge committed error. His conclusion is not supported, and a contrary conclusion plainly is. The error actually derives from a misperception of the law.

It has been suggested that "there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time." *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) (Friendly, J.). See *Brown* v. *Illinois*, 422 U.S. 590, 605 & n.12 (1975); *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968) (Harlan, J., concurring in part and dissenting in part). The factors relied on by the judge were not themselves strong enough to provide "insulation," and in all events they were quite overcome by other circumstances. The statement was made a relatively short time after the confession, and at the same place; it was corroborative of the confession; there was no opportunity for consultation with family; although, as we have noted, there had been a statement that the confession would help the defendant or even free him in the end, we cannot say he had such confidence as would mark a "break in time or the stream of events" (see *Commonwealth* v. *Haas*, Mass. , [1977] [Mass. Adv. Sh. (1977) 2212, 2223]) sufficient to dissociate the statement from the confession. Cf. *Commonwealth* v. *Mahnke*, *supra*, 368 Mass. at 667. Nor do we think it may be assumed that remorse was so far at work as to provide the "break." See *id.* at 688 & n.31; *Copeland* v. *United States*, 343 F.2d 287, 291 & n.3 (D.C. Cir. 1964). Finally, the confession was rendered involuntary by police misconduct which cannot be termed inadvertent. Cf. *Knott* v. *Howard*, 378 F. Supp. 1325 (D.R.I. 1974), aff'd, 511 F.2d 1060 (1st Cir. 1975). The burden was on the Com-

monwealth to show circumstances insulating the statement from the confession, see *Brown* v. *Illinois, supra* at 604, and in this we think it must fail.

Our conclusion is in accord with other decisions requiring the suppression of an inculpatory statement which followed an inadmissible confession and which was not made in the course of police interrogation. See *Ricks* v. *United States*, 334 F.2d 964 (D.C. Cir. 1964); *State* v. *Paz*, 31 Ore. App. 851 (1977). Cf. *Copeland* v. *United States, supra* at 292 (Bazelon, C.J., concurring in part and dissenting in part); *Commonwealth* v. *Bordner*, 432 Pa. 405 (1968); *Soolook* v. *State*, 447 P.2d 55 (Alas. 1968), cert. denied, 396 U.S. 850 (1969).

6. *Conclusion*. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

Appendix C.

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, ss. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH D. MEEHAN

Memorandum of Decision with Reference to Motion to Suppress Evidence.

1. On Friday, June 11, 1976, at about 6:30 A.M., there was found on the front lawn of 40 Oak Street, Hyde Park, the body of the victim, one Mary Ann Burkes, maiden name Mary Ann Foley. The deceased was found lying face-down with her white pants below her buttocks, her personal belongings including a large handbag being strewn on the ground near the body. The victim's head was covered by blood, and after the body was removed from the ground there was blood on the grass. A large rock was found near the body of the deceased and a photograph of this rock with blood on it, as well as the rock itself, were introduced into evidence.

2. The defendant filed a Motion to Suppress to which was appended an affidavit of the defendant Joseph D. Meehan, as well as an affidavit of Walter J. Hurley, Esq., counsel for the defendant. This Motion to Suppress and its appendages are incorporated by reference as part of this Memorandum of Decision.

3. I shall now deal with the specific questions which have been raised by the defendant by means of the Motion to Suppress. (A) *The arrest of the defendant*. I rule that the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder, without a warrant, when the said defendant was at Station 5. I further rule that the defendant Joseph D. Meehan was not arrested while he was walking on Hyde Park Avenue at the time the police drove up to him and asked him to come to the station for questioning.

4. With reference to the above two rulings which I have just made, I make the following findings of fact on which I have based these findings.

5. When the police learned about the existence of this homicide in this case and after the body had been examined at 40 Oak Street, the police proceeded in the direction of initiating immediately an ongoing investigation. At the outset the investigation proceeded in two directions. The first aspect of the investigation was that the police undertook to make an inquiry of the neighbors who resided in the neighborhood of 40 Oak Street, the location at which was found the body of the deceased. Another aspect of this investigation was to undertake to learn who was in the area of Cleary Square on the evening of June 10th and the early morning of June 11th, and upon ascertaining the identity of these individuals to have them come to the station to be interviewed and questioned in order to see if they could assist in the progress of this investigation.

6. With reference to the interviews of the people who lived in the neighborhood of 40 Oak Street, several people were questioned by the police and this group included Clare Wilde, Mary Crowley, Nina Giardini, Eleanor Stella and Jean McCarthy, the daughter of Eleanor Stella. The witness Wilde, at about 2:00 or 2:30 A.M. on the morning of June 11th, was awakened by the sound of a barking dog, got up from bed and

heard a tapping noise. While she was looking out her second-story bedroom window, she saw a white male walk by her house in the direction of the Most Precious Blood Church. She described the white male as probably in his mid-twenties, about five feet ten, medium-slender build and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up. She did not see the face of this man as he passed within her view. Three or four minutes later the man returned and she heard what she described as the sound of a large boulder. There was a bush on the lawn of 40 Oak Street which prevented her from seeing the body of the victim.

7. Another witness in the neighborhood was Mary Crowley, the mother of Clare Wilde, who heard a woman scream, "Don't. Please don't." She then heard dogs barking and a tapping noise.

8. At the same time, Officer Feeney was in charge of that aspect of the investigation which was designed to bring to the station young men, known to have been in Cleary Square during the evening of June 10, 1976, and early in the morning of June 11, 1976. The police effort in this direction was designed to get information concerning this crime. A number of young men were brought into the station, to wit: Joseph Ventola, Francis Hughes, John Carroll and Joseph Meehan. Another young man came in on his own initiative because he heard that the police were looking for him; namely, George Quish.

9. Ventola and Carroll came to the police station because the police sought them out, Ventola being at his place of employment and Carroll being at his home at the time the police contacted him. The police informed these two young men that the police were investigating an assault on a woman in Cleary Square on the night before and each one was being asked to accompany the police to the station in order to answer

questions. In addition, one Francis Hughes was also brought to the police station.

10. Ventola knew the victim because he saw her walking her dog near his place of employment, Cooper's Auto Body, Eastern Avenue, Hyde Park. He had seen the victim in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of the Christ Church. He described the white male as seventeen or eighteen years of age, "skinny," with blackish-brownish hair that came to about an inch below the ears and the male was wearing no shirt.

11. Carroll came to the police station and was interviewed in the Detectives' Room in the presence of Detective Solari. The Detectives' Room faces the front of the District 5 Police Headquarters on Hyde Park Avenue. Carroll had seen the victim, whom he had known at school, in the company of one Joseph Meehan whom he, Carroll, had known for six or seven years. The victim and Meehan were sitting on the steps of Christ Church between 11:30 P.M. and 12:00 midnight on the evening of June 10, 1976. As this interview was in progress, Carroll looked out the window of the Detectives' Room and remarked that an individual, thumbing a ride outside the police station at that time, was Joseph Meehan. Detective Solari immediately left the District 5 building by way of a window which was about four feet above the level of the sidewalk. Officer Cannon and Detective Russo left the building by the front door and Cannon got into an unmarked police car in front of the station, made a U-turn, and with Detective Solari in the vehicle proceeded up Hyde Park Avenue in the direction of Joseph Meehan. This car was used so that if Meehan were successful in hitching a ride, the officers intended to follow the car. Officer Russo walked up the sidewalk after Joseph Meehan.

12. Officers Solari and Cannon, in the police car, pulled up alongside Joseph Meehan and did not get out of the car, but Officer Cannon talked to the defendant. He told the defendant that the police were investigating an assault on a woman and they were questioning all the young men who were known to have been in the neighborhood the previous evening and they found out that Joseph Meehan had been there and asked him if he would come back to the station to be interveiwed. Meehan answered in the affirmative but indicated that he was on the way to the Unemployment Office in order to take care of an unemployment matter affecting him and Meehan was told that the police would drive him there if he were delayed. The defendant Meehan opened the rear door of the police car and climbed into the back seat, and Officer Russo got into the back seat with him and they all drove back to Station 5. This occurred at about 10:30 A.M.

13. The description of an individual which had been obtained from the persons on O k Street was as follows: He was wearing blue dungarees, a blue shirt with a print on it, was eighteen to nineteen years old, was slim and no mention was made of his height. At the station observations of the defendant indicated that he was wearing cutoff dungarees, a blue shirt with the sleeves rolled up and a print on the shirt.

14. At the District 5 Headquarters, Solari sat down, facing Joseph Meehan, for the purpose of interviewing the defendant. At the same time Detective Cannon pursued his duties in connection with the investigation and then undertook to interview one George Quish who had come to the station because he had heard that the police wanted to talk to him.

15. When Solari sat down facing Meehan, he was about one and a half feet away from Meehan. The defendant sat down and crossed his legs and Detective Solari observed a rust-colored stain on Meehan's sneakers. The officer's experience suggested to him that this might well be blood and he asked

Meehan what was the stain on his sneakers. Meehan responded that it was probably mud from the pond in Dedham where he had been swimming the day before. Solari responded that the stain looked like blood to him and Meehan said that if it were blood, the blood belonged to George Quish because he had a fight with George Quish some time ago. Officer Solari asked Meehan if he could have his sneakers and Meehan took his left sneaker off and handed it to the officer. Immediately thereafter, the sneaker was subjected to chemical examination and tests by the Police Department chemist, one Stanley Bogden, and his tests indicated that the stain was blood. At the same time and inasmuch as Quish was then in the station being interviewed by Officer Cannon, Sergeant Feeney asked Officer Cannon to question Quish as to whether or not he had had a fight with anyone recently. Quish denied that he had had a fight but stated that the cut on his nose was as a result of falling down drunk some night a week before.

16. Thereupon, the defendant Joseph Meehan was placed under arrest.

17. I have recited these fcts at some length in order to demonstrate that in my judgment the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder and to do that without a warrant while at the police station. I find and rule that at the moment of his arrest, the arresting officer had knowledge of facts, based upon reasonably trustworthy information, sufficient to warrant him as a prudent man in believing that Meehan had committed this crime.

18. This recitation of facts also is designed to indicate that I came to the conclusion that when the police drove after Joseph Meehan on Hyde Park Avenue and asked him to come back to the station where the officers were questioning a group of young people who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, that the defendant voluntarily agreed to come back to the Police Headquarters at District 5 and was subjected to no restraint of any sort. For these reasons, then, I have ruled that the arrest of Joseph Meehan occurred at the District 5 Headquarters as stated above and that that arrest was based upon probable cause and therefore it was not necessary to obtain a warrant for his arrest. And for like reasons I have ruled that the defendant was not arrested in the course of the occurrences recited above on Hyde Park Avenue preceding the defendant's return to the District 5 Headquarters with the police in order to be interviewed. I rule, as well, that the arrest of Joseph Meehan as described above was a legal arrest and on that basis the arguments of the defendant which had been made and based upon the premise of an illegal arrest are no longer discussed by me in that they fail for the reasons stated above. In addition to the above, I rule that the activity which occurred on Hyde Park Avenue on the morning of June 11, 1976, with reference to the police car and the officers and Joseph Meehan were actions taken by the police in connection with an ongoing investigation and that at that time the defendant was asked to come back to District 5 Headquarters with all the other men who were known to have been in that vicinity on the evening of June 10 and the early morning of June 11, 1976. In addition, I find and rule that in any event Joseph Meehan voluntarily agreed to go back with the police to District 5 Headquarters in order to be interviewed with this group of young people which I have just described. I find that the defendant's liberty of movement had not become restricted by the action of the police, nor had he, in effect, submitted to the authority and control of the arresting officers, and for that reason he went with the police to District 5 Headquarters voluntarily.

19. (B) *The sneakers of the defendant*. In view of my rulings above and the facts recited above, I find and rule that the

defendant Meehan voluntarily turned over his sneakers to Detective Solari at the request of the latter. Indeed, I find and rule that the defendant was not in custody by way of arrest at the time the defendant voluntarily gave his sneakers to the detective. The defendant's counsel has theorized as to what would have happened if Meehan had declined or refused to return to Police Headquarters. The facts of this case, as I have found them, make such speculation immaterial and further discussion thereof unnecessary.

20. The fact that the police reacted with speed when Meehan's thumbing a ride on Hyde Park Avenue was brought to the attention of the police officers and the fact that the police cars were in the ready-to-use position, point to an efficient and alert police action, particularly as they were in the initial stages of investigating what appeared to be a brutal homicide which had just been brought to the attention of the police.

21. Of course the ordinary citizen is called upon to assist the police in connection with their investigation of a crime. It is the duty of every citizen to assist the police in that direction and up to the point of self-incrimination. When the police caught up with Meehan on Hyde Park Avenue, he was one of a group of young men who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, 1976, and who were being brought to District 5 Headquarters to be interviewed and possibly to render assistance with reference to this crime. I find that this was the posture of the defendant Meehan at that time.

22. (C) *The defendant's statement to the police.*

a. Was it voluntary?

b. Was there any violation of the Miranda rule, so-called?

23. I have already ruled that the arrest of the defendant in this case was a legal arrest, made upon probable cause in compliance with the law. Therefore, I do not deal with the de-

fendant's statement on the subject of inculpatory admissions on the basis of an illegal arrest, as has been argued in part by counsel for the defendant.

24. In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976, (a total of twenty-four tablets) and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer: Such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up of tolerance in a constant drug user; the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his responses thereto; the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Kelly, as contained in Exhibit 14, Pages 29 to 48, inclusive.

25. On the basis of the above, I find and rule as follows:

A. The Commonwealth has not satisfied the burden of proving that the defendant waived his rights *intelligently, voluntarily* and *knowingly*. The defendant's one-word responses to each of the said warnings, indicate to me nothing more than that the Miranda warnings were recited to Meehan and he apparently heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to constitute a waiver of these very vital rights of a defendant. The requirement that a waiver be made *intelligently, voluntarily* and *knowingly,*

requires something more than "Right," "Yes," and/or "I waive." For example, the Judge must be satisfied that such waivers were made "knowingly": It must appear in some way that a defendant knows what each right means with reference to him and the present charges against him; he must do something more than acknowledge the mere reading of each of these constitutional rights and give an affirmative statement such as "Yes" or "Right" to the query that he "understands that" which has been read to him. There is no statement that having understood the reading of his "rights" to him that the police are obligated to respect his insistence on his rights if he asserts his rights. And thereafter to finalize the cutoff from the defendant of his constitutional rights by means of the question: "Are you willing to talk to me about Mary Ann Burkes?" Answer: "Yes," and with the completeness and finality which the government asserts opens up the entire charge of murder and exposes the defendant to the serious and life-long consequences that would follow, is entirely too deadly an application of what is supposed to be a procedure whereby one can defend himself by silence against an almost overpowering set of circumstances. Such a rote reading of the "Miranda card rights" makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual. This Court is unable to infer that this eighteen-year-old defendant, with moderate and limited schooling, after riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between the two doctor experts, with the dimness of his sense of judgment still hanging over him, was even aware of the significance of his rights, much less the significance of his waiver of these rights. And the fact that he knew his name and address, and where he lived, his age and telephone number, is hardly an adequate basis for saying

that the defendant should therefore be held to have intelligently, voluntarily and knowingly waived his priceless rights he enjoys by saying "Yes" to the question, "Are you willing to talk to me about Mary Ann Burkes?" For this question to constitute the key to this waiver is strange, because the wording of this question itself is peculiar. The Miranda warning does not prohibit talking about the victim, but about the crime committed upon the victim. A literal application of the government's standard of interpreting the effect of the defendant's responses of "Right" and "Yes," would suggest that his answer of "Yes" should limit his willingness to talk to Sergeant Kelly about Mary Ann Burkes, but not of the manner in which she met her death nor with reference to the crime of the homicide of the victim, each of which would appear to require a more appropriate and direct question and answer. A shallow interpretation of such rule as the Miranda warning requirement without some evidence that the defendant intelligently, voluntarily and knowingly "waived" these rights, is almost to say that there is no rule at all.

26. In addition, there is no evidence that the defendant was told that he could make a telephone call to his mother or anyone else. And the eighteen-year-old male, coming out of a bout with Valium and not being smart enough to ask for or even think of it, should have been given the opportunity to use the telephone.

27. I think, in addition, that the most telling aspect of the defendant's statement, with its confessions, etc., is a transcript of the questioning of the defendant itself. I make reference to Sergeant Kelly's routine recitation of the constitutional rights to the defendant on Pages 29 and 30; the defendant's one-word answers thereto; on Page 33, the defendant *wanted to see* the witnesses who said he was with the deceased on the church steps the previous night; Page 33 and 34, that there were two

separate witnesses who were stated to know Meehan for several years, that they are positively sure that it was Meehan and that is the reason you are in here; and there follows lines of ominous expressions, then a suggestion to think it over but Meehan was given no time to do so; then telling the defendant he is under arrest and a reference that the defendant had been given his rights, and the defendant's response was "Under arrest for what?"; the defendant asked again to see the witnesses who identified him. Then Sergeant Kelly adds "I am sure I am not fooling around. I am not trying to trap you in any shape or form"; then on Page 39 Sergeant Kelly asks "Is there anything else, Joe, you would like to tell us?" and the defendant Meehan's response was "No." And nevertheless Sergeant Kelly proceeded right along with the questioning, ignoring what had just been stated to him by the defendant; the defendant further told Sergeant Kelly that he "Got whacked out last night . . . on downers . . . Valium"; on Page 40, after Meehan denied anything happened between the victim and himself, there follows three statements by different police officers with no answers by the defendant. For example, just above the middle of the page on Page 40, the question: "Well, I don't know what to say to you, Joe. I told you all about what we have here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about." (No answer by the defendant.) The next statement in the transcript under question, "Joe, somebody said to me that you wanted to ask me a question. Is there something you want to know?" (No answer by the defendant.) Question: (Detective Madden) "Well, he did say, 'Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be.' We have no control over that. We go in and present the facts. Anyway, we are here to help." (No answer by the defendant.)

28. The next question appears to be a statement by Sergeant Kelly which begins at the lower third of Page 40, and goes down to the fifth line, inclusive, on Page 41. The next entry in the transcript on Page 41 under answer is the defendant's statement, "Can I go home and get some clothes?" And Sergeant Kelly's next question begins, "We will see that the clothes come to you. No problem there," etc.; going over to Page 42 of the transcript under the word question, "You told me you were on those pills and everything else. I don't know what bearing that would have on it. Are you still —", end of the question. The defendant Meehan responded "High from last night. A little jiggy." "But you still understand me, don't you?" Meehan's answer, "Yea." And when Sergeant Kelly asked, "Do you wish to tell me what the story was, Joe?" The defendant's answer, "Yea. But if I tell you, right, it is going to come out in the court?" Thereafter Sergeant Kelly makes a statement of how they have a good case and so forth, and Meehan's answer is, when Sergeant Kelly says "So it is up to you, Joe," his answer is "I don't know." And thereafter Sergeant Kelly begins the next paragraph with the statement, "You don't know what?" And then the transcript proceeds for eight or ten lines concluding that, "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." On Page 45 the defendant Meehan's answer to the question "You did? Okay, then, you —", that being the end of the so-called question, Meehan's answering being "Does that mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelly's question, so-called, answers "No." And then the defendant Meehan said, "Why are you patting me on the back?" And the question (voice in the background) "Because you are telling the truth."

29. I have made these references to the statement of the defendant in the transcript in order to indicate that I came to

the conclusion that the defendant didn't really appreciate what was happending to him at that time and how much danger he was in at the hands of this very skillful police interrogation man. Sergeant Kelly indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven with long, many faceted statements, presumably supposed to have been in the form of a question and in these statements many different issues were referred to and raised, and in some instances the defendant merely responded "Yes" or "Yea." I find that Sergeant Kelly succeeded, and to use his own term, in trapping the defendant into making affirmative responses to questions, supposedly, which were so complex in form that an intelligent person would be incapable of knowing which aspect of Sergeant Kelly's statement the defendant Meehan was responding to. There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything. In addition, when the defendant Meehan asked the several questions to which I made reference, Sergeant Kelly proceeded to brush right over them, particularly the statement in which Meehan was asked, as reflected on Page 39 of the transcript, "Is there anything else, Joe, that you would like to tell us?" and the defendant Meehan's answer was "No." At this point I rule that Sergeant Kelly was obligated under the rationale of the Miranda warning decision to halt immediately any further questions of this defendant. Sergeant Kelly proceeded to ignore that assertion and I have concluded that the defendant was incapable of competing with this type

of assault upon his mind and completely unprepared and incapable of asserting and insisting upon his rights under the Constitution. I find that Sergeant Kelly, in his very skillful and effective manner, completely overpowered the defendant Meehan so that he had no trouble at all in getting the defendant Meehan to agree to anything. The rationale of the Miranda warning decision is such as was designed to protect a young defendant, such as the defendant Meehan in this case.

30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety. In order that anyone making reference to this decision may have access to the interview of the defendant Meehan by Sergeant Kelly, I hereby incorporate by reference that part of Exhibit 14, beginning on Page 29 and concluding on Page 48, of that exhibit.

31. (D) *Miscellaneous*. There are other questions which have been raised by counsel for the defendant to which I shall make reference at this point. The defendant's counsel asserts that the defendant was denied effective assistance of counsel. There was no evidence that the defendant was informed that he was entitled to make a telephone call and, of course, I am unable to determine whether he would have called his mother or a lawyer. Nevertheless, the defendant's lawyer appeared on the scene at about 5:00 o'clock in the afternoon on June 11, 1976. After he talked to the defendant, he left at about 6:00 P.M. to take care of his Little League responsibilities and returned thereafter at about 11:00 P.M. Inasmuch as there is

no reference to the defendant attempting to call a lawyer or his mother or being denied this right, and at the same time there was no indication, as the government argues, that the defendant was discouraged concerning the question of a lawyer, I cannot impute to the police anything with reference to this particular aspect of the case and, therefore, I cannot rule that he was denied effective assistance of counsel. It appears that his lawyer wished to talk to the defendant and without the presence of a security officer, who is required under the Boston Police Department rules and regulations, to keep a prisoner such as the defendant who was in custody under his immediate control. The police officer informed the attorney that the rules of the Boston Police Department did not permit him to absent himself from the presence of the defendant or to remove himself so that he would not have a clear view of the defendant. I consider that to be an appropriate regulation of the Boston Police Department so that the security of a person who has been arrested on such a serious charge shall be maintained, particularly at this stage of the proceeding. I do not consider that to be an unreasonable regulation for the Boston Police Department to have, nor a position for the security officer himself to assert when the defendant's attorney wished to be left alone in District 5 with the defendant.

32. When the defendant's mother and his brother came to visit the defendant at District 5 Headquarters, there was some conversation between the defendant and his mother and brother. And I find that whatever statement was made spontaneously by the defendant to his mother, which was heard by a police officer, should not be suppressed for any reason presented by the defendant in this case. It is plain, and I so rule, that when a defendant makes a statement to his mother and/or brother or both of them such as has been claimed in this case and the questioning process has not been prompted or instituted by the police themselves, that when such statement

has been made and it is overheard by a police officer who is properly in the building and at the position he has assumed at the time, that such statement is not to be suppressed under those circumstances.

33. The defendant has raised, in addition, the question that when the defendant was at the police station his attorney requested a medical examination which would have included a blood test. There were no facilities for such an examination at that particular time at the District 5 Headquarters. And I rule that the failure to have a medical examination at that time and at that place does not constitute a deprivation of the defendant's rights under those circumstances. Counsel for the defendant has raised the question as to the validity of the warrant which the police obtained in order to get possession of the pants that the defendant was wearing at the time of the alleged incident. Inasmuch as the location of these pants was obtained as a result of the statement by the defendant to Sergeant Kelly which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well.

34. Therefore, with reference to the Motion to Suppress for the reasons stated in my Memorandum of Decision, the motion is allowed with reference to any statements of the defendant which appear in Exhibit 14, Pages 29 through 48, which is the statement of Joseph Meehan in its entirety as was obtained by Sergeant Kelly and which was dated Friday, June 11, 1976, and taken at 11:20 A.M. The defendant's motion to suppress the two sneakers, for reasons set out at length in my Memorandum of Decision, is hereby denied.

35. The defendant's motion to suppress the pair of pants which were seized at his home on June 11, 1976, for reasons set out in my Memorandum of Decision, is hereby allowed.

FRANCIS JOHN GOOD,
Justice, Superior Court.

Dated: August 5, 1977.

APPENDIX.

In the
Supreme Court of the United States.

OCTOBER TERM, 1978.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

v.

JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Petition for Writ of Certiorari Filed June 18, 1979.

Certiorari Granted October 1, 1979.

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COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH

vs.

JOSEPH MEEHAN

Docket Entries.

1976		
August		
10		Bail reduced to $100,000. See record in No. 03795.
11	(1)	Indictment returned.
		Copy of indictment and notice of the finding of indictment sent to Chief Justice and Attorney General.
		Copy of indictment with notice of finding of indictment and that it would be entered forthwith on docket of this Court sent by Clerk to Sheriff for services on defendant in Common Jail.
13	(2)	Order of notice with return of service on defendant endorsed thereon by Sheriff filed.
19		Brought into Court — continued by order of Court to August 25, 1976 for

1976

August

hearing re: Counsel. Dwyer, J. — L. Dzygala, ADA — T. Foley, Court Reporter.

25 Brought into Court — indictment read. Pleads not guilty.

Court allows 30 days for filing special pleadings, all motions and grants leave to be heard thereon.

Court orders defendant examined by Court Clinic Psychiatrist September 21, 1976. Continued by order of Court to September 21, 1976 for Exam — Conference for October 6, 1976. Dwyer, J. — S. Hamlin, ADA — M. Kevill, Court Reporter — T. McManus, attorney for defendant.

September

27 Defendant not in Court — continued by order of Court to October 14, 1976 for hearing. Mason, J. — S. Hamlin, A. D. A. — E. Goldberg, Court Reporter.

October

12 (3) Psychiatric Report of Eugene J. Balcanoff, M. D., filed.

14 Brought into Court — continued by agreement to January 19, 1977 for trial. Mason, J. — S. Hamlin, A. D.

1976

October

14 A. — E. Goldberg, Court Reporter — N. McManus, attorney for defendant.

December

22 (4) Defendant files: Motion to Make Trial and Pre-trial Proceedings Subject to Gen. Laws Chap. 278, Sects. 33A to 33G;

(5) Motion to Inspect Photographs;

(6) Motion to Be Furnished With Statements Concerning Identification;

(7) Motion to Inspect Statements of Commonwealth Witnesses;

(8) Motion For Copy of Statements;

(9) Motion of the Defendant to Inspect Evidence;

(10) Motion to Inspect Exhibits Presented to the Grand Jury;

(11) Defendant's Motion to Be Furnished With Criminal Records and Probation Records;

(12) Motion of the Defendant For the Production of Police Department Reports;

(13) Motion of the Defendant to Be Furnished With Statements of Promises, Rewards or Inducements;

(14) Motion for List of Names and Addresses of Witnesses Who Were Summonsed to Testify Before the Grand Jury;

(15) Motion of the Defendant to Be Furnished With Autopsy Reports;

1976

December

22 (16) Motion to Be Furnished With Evidence Favorable to the Accused;

(17) Motion to Be Furnished With Names and Addresses of Commonwealth Witnesses;

(18) Motion of the Defendant For Inspection of Grand Jury Minutes.

1977

February

3 Brought into Court — Defendants statement re: trial date filed and allowed. Continued by order of Court to May 16, 1977 for trial — defendant not objecting thereto.

Mason, J. — S. Hamlin, A.D.A. — E. Goldberg, Court Reporter — D. Mills, attorney for defendant.

March

24 (19) Defendant's Motion to be furnished with tape recordings of conversations between the defendant and any other persons on June 10, 11 and 12, 1976, filed.

(20) Defendant's motion for late filing of motion to suppress and for late filing of motion to be furnished with tape recordings, etc. filed.

(21) Defendant's motion to suppress received but not filed in accordance with Rule 61.

1977

May

4 (22) Commonwealth files: Motion for disclosure of alibi or insanity defense;

(23) Motion for disclosure of names, addresses and birthdays of defense witnesses;

(24) Motion for blood test of defendant;

(25) Motion for a view;

9 Defendant not in Court. Lobby conference with S. Hamlin, A.D.A. present;

(26) Court, Good, J., allows motion to suppress to be filed.

It is reported by the Court, Good, J., that the following motions are allowed by agreement: Paper #4-11 inclusive, 13-18 inclusive; 20 and 21, Paper #22 to 25.

Relative to Paper #24 — order issued by the Court, Good, J.

Paper #12 — no action. Good, J. — S. Hamlin ADA.

16 (27) Defendant brought into Court — files: Motion for postponement;

(28) Motion requesting an order for the attendance of a witness in custody — writ of habeas corpus issued;

(29) Motion for sequestration of witnesses, allowed — hearing on motion #26; Good, J. — A. Hamlin, ADA — E. Lucas, Court Reporter — W. Hurley and D. Mill, attorneys for defendant.

17 Defendant brought into Court — hearing continues — all parties present.

1977

May

18 Defendant brought into Court — hearing continues — all parties present.

19 Defendant brought into Court — hearing continues. All parties present.

20 Defendant brought into Court — hearing continues.

23 Defendant brought into Court — hearing continues — arguments scheduled for May 27, 1977, @ 10:00 A.M. Good, J. — S. Hamlin, ADA — E. Lucas, Court Reporter — W. Hurley and D. Mill, attorneys for defendant.

June

1 Defendant brought into Court — hearing on arguments re: Motion to Suppress.

(30) Motion to amend existing motion to suppress filed by leave of Court.

At conclusion of arguments, motion taken under advisement. Good, J. — S. Hamlin, ADA — E. Lucas, Court Reporter — D. Mill, attorney for defendant.

August

8 (31) Good, J., Memorandum of decision with reference to motion to suppress evidence filed. (Notify attorney of record and A.D.A.)

1977

August

22 (32) Defendant's notice of exception, filed. (Good, J. and S. Hamlin, ADA, each notified).

26 (33) Motion for bail filed.

Brought into Court, hearing re: paper # 33, after hearing denied without prejudice.

Strogoff, DCJ — S. Hamlin, ADA — E. Taper, Court reporter — W. Hurley, attorney for defendant.

September

7 (34) Commonwealth's notice of appeal, filed.

(35) Attested copy of order of Supreme Judicial Court, Liacos, J., granting interlocutory appeal under General Laws, Chapter 278, section 28E from decision on defendant's motion to suppress as to Commonwealth's amended application and defendant's cross application for interlocutory appeal, and reporting said appeal to the full Court for hearing, filed.

(36) Attested copy of Commonwealth's motion for incorporation of transcript as part of the record in the application for interlocutory appeal, allowed by Liacos, J., Supreme Judicial Court, filed.

1977		
October		
6		Letter sent to Good, J. re: Court's order for preparation of transcripts
14		Court Good, J. orders 4 copies of the transcript of evidence be prepared: 2 copies for the Appeals Court, 1 copy for the District Attorney and 1 copy for the defendant at his own expense
	(37)	Order filed.
		Letter sent to Court Reporter E. Lucas, re: Court's order for preparation of transcripts.
		Request for designation of pleadings sent to Attorney of record and Assistant District Attorney.
December		
16		Second letter sent to Court Reporter E. Lucas re: Court's order for preparation of transcripts.
1978		
April		
14	(38)	Two copies of the transcript of the evidence delivered to clerk by E. Lucas Court Reporter. Court Reporter Certificate — filed.
		Written notice of the completion of the summary of record sent to Attorney of Record.
	(39)	Clerk's certificate — filed.
	(40)	Commonwealth's Assignment of Errors filed.
	(41)	Defendants Assignment of Errors filed.

SUPREME JUDICIAL COURT

No. 1487.

COMMONWEALTH

vs.

JOSEPH MEEHAN

Docket Entries.

6-22-78.	Transfer sua sponte from Appeals Court.
	Entered June 26, 1978
7-24-78.	Service of Brief for Commonwealth by Sandra Hamlin, A.D.A.
7-28-78.	Service of Brief (As To Issue Upon His Application) for Defendant by David A. Mills and Walter J. Hurley.
	Argued December 5, 1978 (L, B, CJ, K, A)
12- 6-78.	Commonwealth's motion to file exhibits not already before the Court.
12- 6-78.	Commonwealth's motion for incorporation by reference of Commonwealth's
	Memorandum of law in support of its application for interlocutory appeal.
12- 7-78.	Opposition of Defendant to Commonwealth's Motion for Incorporation By Reference of Com-

monwealth's Memorandum of Law in Support of Its Application for Interlocutory Appeal, filed by David A. Mills of Mills & Teague, 100 Federal Street, Boston 02110.

3-19-79. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with the opinion.

Rescript March 19, 1979.
Reasons as on file.
Notice sent to counsel.

10- 1-79. Petition for writ of certiorari to the Supreme Judicial Court for the Commonwealth of Massachusetts granted by the Supreme Court of the United States No. 78-1874.

Indictment No. 03504.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. At the Superior Court, begun and holden at the City of Boston, within and for the County of Suffolk, for the transaction of Criminal Business, on the first Monday of August, in the year of our Lord one thousand nine hundred and seventy-six.

The jurors of the Commonwealth of Massachusetts on their oath present that Joseph Meehan, on the eleventh day of June, in the year of our Lord one thousand nine hundred and seventy-six, did assault and beat one Maryann Birks, with intent to murder her, and by such assault and beating did kill and murder the said Maryann Birks.

A TRUE BILL.

SANDRA L. HAMLIN,
Assistant District Attorney.

WILLIAM J. CARNEY,
Foreman of the Grand Jury.

August 11, 1976. Returned into said Superior Court by the Grand Jurors and ordered to be filed.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH MEEHAN

Motion to Suppress.

Now comes Joseph D. Meehan who moves that this Court suppress as available evidence purported statements made by him while in the custody of detectives of the Boston Police Department on June 11, 1976.

The defendant further moves to suppress as available evidence two shoes (or sneakers) that were taken from him while in the custody of detectives of the Boston Police Department on June 11, 1976.

The defendant further moves to suppress as available evidence in this case a pair of pants which were seized at his home on June 11, 1976.

And, in support of this motion, the defendant submits, in accordance with Superior Court Rule 61, the affidavits annexed hereto.

Respectfully submitted,

WALTER J. HURLEY
22 Beacon Street
Boston, Massachusetts 02108
742-2420

AFFIDAVIT OF JOSEPH D. MEEHAN.

Now comes Joseph D. Meehan who makes the following affidavit in support of the Motion to Suppress which is submitted herewith:

1. My name is Joseph D. Meehan and I am presently at the Charles Street Jail in Boston.

2. In June of 1976 I resided with my mother and several brothers and sisters at 1559 River Street in Hyde Park.

3. On June 10, 1976, at approximately 9:00 P.M., I ingested approximately twenty tablets of Valium, and I believe that the size of the tablets was 5 milligram dosage.

4. On June 11, 1976, at approximately 8:30 A.M., I ingested three to four additional Valium tablets.

5. Between the hours of 6:00 P.M., and 11:00 P.M., on June 10, 1976, I drank approximately 12 containers of beer.

6. On June 11, 1976, at approximately 9:00 A.M., I was arrested by the Boston Police and taken into custody.

7. At the time I was arrested, the police told me that they would give me a ride to get my unemployment check.

8. I was taken to a police station and questioned without a lawyer being present. I do not remember all the questions or all the answers. I believe, however, that there were five, six or seven police officers present during the questioning. I further believe that the questioning lasted approximately 2½ hours.

9. At the time I was questioned I was unaware of the need for a lawyer or of my right to a lawyer and I was frightened.

10. I have read a transcript of the probable cause hearing in this case. It was brought to me by Attorney Mills and I have discussed it with Attorney Mills and with Attorney Hurley. I do not believe that I said the things that the police claim that I said during my questioning.

11. I do not believe that the police had a warrant for my arrest when they arrested me.

12. I do not believe that the police told me that I could have my mother, friends or a lawyer with me.

13. I believe that the police took one or two of my sneakers from me while I was at the police station.

JOSEPH D. MEEHAN

SUFFOLK, SS. DATE: March 17, 1977

Then personally appeared Joseph D. Meehan who made oath to the truth of the foregoing.

Before me,

DAVID A. MILLS
Notary Public

My Commission Expires:
8/18/83

AFFIDAVIT OF COUNSEL.

I, Walter J. Hurley, an attorney for Joseph D. Meehan, represent and aver that the discovery materials in this case, furnished by the Commonwealth, include a document which purports to be an inculpatory statement of admission made by Joseph D. Meehan on June 11, 1976, in Detectives Room, District No. 5, Boston Police Department, at 11:20 A.M.

Based upon conversation with the personnel of the office of the District Attorney for Suffolk County, I believe that the Commonwealth intends to offer this statement as evidence in this case.

WALTER J. HURLEY

Filed by leave of court (Good, J.) May 9, 1977.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH

vs.

JOSEPH MEEHAN

Motion to Amend Existing Motion to Suppress.

The defendant, by his counsel, moves this Court to allow amendment to the existing motion to suppress, by adding the following as a third paragraph thereof:

> The defendant moves to suppress as evidence against him a statement purportedly made by the defendant to his mother, in the presence of Detective Feeney, while in custody, between the approximate hours of 3:00 P.M. and 4:00 P.M. on June 11, 1976.

and, in further support of the motion to suppress the defendant states that he was deprived of the effective assistance of counsel, as appears of record from the testimony before this Court during hearing of the motion to suppress.

Respectfully,

/s/ WALTER J. HURLEY
22 Beacon Street
Boston, Ma. 02108
742-2420

Filed June 1, 1977 (Good, J.).

Exhibit 4.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. WEST ROXBURY DISTRICT COURT.

Affidavit in Support of Application for Search Warrant

G.L. c. 276, ss. 1 to 7; St. 1964, c. 557 As Amended

June 11, 1976

I, James J. Solari, being duly sworn, depose and say:
1. I am a Detective Boston Police Dept.
2. I have information based upon personel knowledge. About 5:54 A.M. June 11, 1976 Wm. D. Ford and J. Benedetti in the 5-7 car responded to a radio call to 40 Oak St.. Upon their arrival the officers found a white female lying face down on the front lawn of #40, with blood around her head and apparently dead. Dr. N. Brenner responded and pronounced the victim dead at 6:20 A.M., June 11, 1976. John Foley, 29 Eastern Ave., H.P. identified the victim as his daughter, one Mary Ann Foley, (Birks), 23 Yrs., 29 Eastern Ave., H.P., at 6:20 A.M.. Further investigation led to the questioning of one Clair Wild, 28 Yrs., 38 Oak St., H.P. who stated that she was awakened about 2:30 A.M. by a woman screeming. She further stated that she went to the front window of her home and observed a white male, slender build, long dark hair cut above his shoulders, neet looking, 5'8" to 5'10", wearing blue shirt with long sleeves rolled up short and fadded blue dungarees, walk from the approximate area of the body down oak St. in the direction of Maple St.. About three minutes later she stated she heard a woman screem and then heard a thump

type noise ("like a garage door hitting the ground.") again she went to the window and observed the same male walking away from the area of the body and walking on Oak St. in the direction of Pine St. Upon further investigation by detectives of Dist. #5 and Boston Homicide division revealed that the victim had been seen in the company of one Joseph D. Meehan, 1559 River St., H.P.. Joseph Meehan was brought to dist #5 for questioning and after being informed of his rights. About 1:00 P.M. after being place under arrest for the murder of Mary Ann Birks, Joseph D. Meehan stated to the investigating officers that he did in fact kill Mary Ann Birks and the pants that he was wearing at the time of the incident are now located at his home at 1559 River St.. I Detective James Solari while in West Roxbury Dist. Court and writing this affidavit was informed at 1:05 P.M. June 11, 1976 by Det. Sgt. James Feeney of Dist. #5 of the above confession and location of the pants.

3. Based upon the foregoing reliable information — and upon my personal knowledge and belief — and attached affidavits — there is probable cause to believe that the property hereinafter described — has been stolen — or is being concealed, etc. and may be found in the possession of Joseph D. Meehan at premises 1559 River St., H.P.

4. The property for which I seek the issuance of a search warrant is the following: one pair of fadded blue dungrees (mens)

WHEREFORE, I respectfully request that the court issue a warrant and order of seizure, authorizing the search of 1559 River St. and two and one half story wood frame house with light green aluminum sideing and white trim. 1559 & 1557 being a side by side duplex with 1559 entrance to the left when facing the house from the street and directing that if such property or evidence or any part thereof be found that it be

seized and brought before the court; together with such other and further relief that the court may deem proper.

JAMES J. SOLARI

Then personally appeared the above named James J. Solari and made oath that the foregoing affidavit by him subscribed is true.

Before me this 11th day of June 1976

RICHARD F. FELL,
Assistant Clerk of Municipal Court

Exhibit 5.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. MUNICIPAL COURT OF THE WEST ROXBURY DISTRICT

Search Warrant.

TO THE SHERIFFS OF OUR SEVERAL COUNTIES, OR THEIR DEPUTIES, ANY STATE POLICE OFFICER, OR ANY CONSTABLE OR POLICE OFFICER OF ANY CITY OR TOWN, WITHIN OUR SAID COMMONWEALTH:

Proof by affidavit having been made this day before Richard F. Fell, Assistant Clerk by James J. Solari that there is probable cause for believing that certain property has been stolen, embezzled, or obtained by false pretences — certain property is intended for use or has been used as the means of committing a crime — certain property has been concealed to prevent a crime from being discovered — certain property is unlawfully possessed or kept or concealed for an unlawful purpose.

WE THEREFORE COMMAND YOU in the daytime (or at any time of the day or night) to make an immediate search of 1559 River Street, Hyde Park, two and one half story wood frame house with light green aluminum siding and white trim, 1559 & 1557 being a side by side duplex with 1559 entrance to the left when facing house from street, Joseph D. Meehan, and of any person present who may be found to have such property in his possession or under his control or to whom such property may have been delivered, for the following property: one pair of fadded blue dungrees (men's) and if you find any such property or any part thereof to bring it and the persons in whose

possession it is found before the Municipal Court of the West Roxbury District at 445 Arborway, Jamaica Plain, Massachusetts in said County and Commonwealth, as soon as it has been served and in any event not later than seven days of issuance thereof. (Officer to make return on reverse side)

Witness, Paul Murphy, Esquire, Justice, at said Court aforesaid, this 11th day of June in the year of our Lord one thousand nine hundred and seventy-six.

RICHARD F. FELL,
Assistant Clerk

RETURN OF OFFICER SERVING SEARCH WARRANT.

I received this search warrant July [*sic*] 11, 1976, and have executed it as follows:

On July [*sic*] 11, 1976, at 2:15 o'clock P.M., I searched the premises described in the warrant.

The following is an inventory of the property taken pursuant to the warrant: one pair men's blue jeans (bloodstained), one pair men's undershorts.

This inventory was made in the presence of Louis Russo and William Cannon.

I swear that this inventory is a true and detailed account of all the property taken by me on the warrant.

JAMES J. SOLARI

Subscribed and sworn to before me this 15th day of June, 1976.

JOHN L. SCOLPONETI
Assistant Clerk

Exhibit 14.

[29] Friday, June 11, 1976
Detectives Room District # 5

11:20 A.M.

My name is Sgt. Kelley. I am from the Homicide Unit. With me is Det. Madden, also of the Homicide Unit, Sgt. Det. James Feeney and Det. Russo, both of District # 5, Boston Police Department.

Statement of Joseph Meehan.

Q. (Sgt. Kelley) We are investigating the death of a Maryann Birks. She is also known as Maryann Foley, her maiden name. You are, at this time under arrest, Robert — A. Robert?

Q. Your name Robert? A. No.

Q. What is your first name? A. Joe. Joseph.

Q. What is your last name? A. Meehan.

Q. How do you spell it? A. M E E H A N. I am under arrest?

Q. Yes? Where do you live? A. 1559 River Street, Hyde Park.

Q. How old are you? A. 18.

Q. What is your date of birth? A. 3/2/58.

Q. What apartment do you live in? A. It is not an apartment. It is a duplex.

Q. What floor do you live on? A. We own the whole half of the house.

Q. Up and down? A. Right.

Q. So more or less it is a single house up and down? A. It is two houses put together.

Q. Do you have a telephone there? A. Yes. 364-3655.

Q. Tell me, which side of the duplex do you live in? Looking at the front of your house? A. Left.

Q. Left hand side? A. Yes.

Q. That's 1559, right? Joe before I ask you any questions, I am going to inform you of your constitutional rights. I want you to listen carefully, and I want you to acknowledge each one as I read them. either "yes" or "no" that you understand them.

[30] Q. Before I ask you any questions, you must understand your rights. You have the right to remain silent. Do you understand that? A. Yea.

Q. Anything you say can be used against you in court? Do you understand that? A. Right.

Q. You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during the questioning. Do you understand that? A. Right.

Q. If you cannot afford a lawyer, one will be appointed for you before any questioning, if you wish. Do you understand that? A. Right.

Q. If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time until you talk to an attorney or lawyer. Do you understand that? A. Yes.

Q. Do you understand what I have read to you? A. Right.

Q. Are you willing to talk to me about Maryann Birks? A. Yes.

Q. Joe, Maryann Birks was found up in front of 40 Oak Street, here in Hyde Park, and she was found dead? We have reason to believe she came about her death as a result of violence? In our opinion, she was murdered? Do you know

Maryann Birks? A. No. Well she has been around. Everyone knows her, you know.

Q. Then you know her? Is that correct? A. Yea.

Q. How long have you known her around town? A. Oh, a couple of weeks.

Q. Just a couple of weeks? A. Yea, she comes in Charley's a lot.

Q. Is that Charley's Saloon? A. Charley's Bar, on River Street near the bridge.

Q. Have you seen her in that place? A. Yea.

Q. Did you ever talk with her? A. Yea.

Q. Did you ever go out with her? A. No.

Q. You never went out with her? When was the last time that you saw Maryann Birks? A. I think it was Tuesday.

Q. This is June 11th, Friday, and you are going back now to Tuesday, June 8th, right? That's three days ago, right? A. Yea?

[31] Q. Where did you see her? A. At the bar.

Q. At Charley's Bar on River Street? A. Right.

Q. What time was that that you saw her? A. Oh, 11:30.

Q. At night? A. Yea.

Q. Did you have an occasion to go out with her? A. No.

Q. Did you ever go out with her? A. No, she never turns me on.

Q. Huh? A. She never turns me on.

Q. Did you ever go out with her? A. No.

Q. You were never with her? A. No.

Q. At any time? A. Just to talk with her. That's all.

Q. Talk with her? When was the last time you talked to her? A. That Tuesday.

Q. That Tuesday? June 8th? A. Yea.

Q. Are you sure about the date and the time? A. Yea.

Q. I notice that you are wearing yellow sneakers, yellowish type sneakers? A. Right.

Q. And I observe there was blood on them. They have been tested, and we found blood on the sneakers. A. On one of them.

Q. On both sneakers, there were blood stains on them. On one it was heavier than the other. I don't recall which it was, the right or the left? Do you recall? You don't recall which one was stained more? Was there blood on that? Do you know? A. Yea, there is blood.

Q. If my memory serves me right, I think it was on the right sneaker it seemed to be penetrated with the blood as you said? Would you tell me how you received the blood on your sneakers? A. I got in a fight with George Quish.

Q. How do you spell George's last name. A. Q U I S H.

Q. What's his first name? A. George.

Q. When did you have a fight with George? A. I think it was Tuesday in the afternoon.

[32] Q. Tuesday, that would be June 8th? Is that right? Was this prior to meeting Maryann? A. No.

Q. Or afterwards? A. This was before.

Q. Before? A. Right.

Q. Was it during the early evening or the daytime? A. The daytime.

Q. Daytime? What time about? A. Say around 7:30.

Q. 7:30 that night, Tuesday, June 8th? A. Right.

Q. Where did it take place? A. Right down here at the new _____.

Q. Where is that located? A. Hyde Park and River.

Q. What was the fight over? A. A disagreement between — there was a fight between _____ and we were taking sides as to who started it, so me and him went at it.

Q. Did you receive any injuries as a result of the fight? A. Well I got a broken finger out of it.

Q. You have a broken finger? A. Yea.

Q. Can you bend it? A. That's it (indicating)

Q. Is it still sensitive and sore? A. Yea.

Q. As I look at it, it looks to be swelled up there, the little finger of your left hand? A. Right, it is broken. Well it was broken several times before. It is broke now and it will be broken again.

Q. Did you go to any hospital since last Tuesday, the 8th, as a result of this fight, to have your finger looked at? A. No.

Q. You didn't? Now I just had a chemist examine those sneakers. He examined the sneakers and found it to be human blood which you say you received in a fight with George Quish? A. Yes.

Q. And this was on June 8th, Tuesday? Today is Friday, June 11th? Is that right? It is eleven o'clock, 11:30 A.M. in the morning? As I can observe by looking at the sneaker, not being a chemist, that the blood is fresh, relatively fresh blood, and I made that statement to the chemist. He said "Yes, this blood is fresh" and [33] he made a test on it, and it is human blood. Do you understand me now? A. Yea.

Q. You understand that this is three days ago, and the blood is a lot fresher than — A. Well you know we went swimming up there yesterday, so the sneakers probably are still wet.

Q. No. It is fresh blood. I am not holding anything back. I am just telling you it is fresh blood? A. How could it be, 3 days ago?

Q. Now, do you wish to comment on that? That the blood is very fresh? and it is the opinion that it couldn't be that old? It must be relatively fresh within hours I would say? A. It couldn't be. Well the only reason it could be fresh is because I fell in the reservoir.

Q. When did you fall in the reservoir? A. Yesterday.

Q. Yesterday? Who were you with at the reservoir? A. Oh, a bunch of people. Everyone who hangs around here. Three car loads of kids.

Q. Mr. Meehan, in all fairness to you right now, you stated you have not seen Maryann since — the last time you saw her was on Tuesday, June 8th? Is that right? A. Yea.

Q. We have witnesses that have you together last night? A. I wasn't with her.

Q. Pardon me? A. I wasn't with her.

Q. You deny the fact that you were with her? A. Yea.

Q. Well we do have witnesses and in all fairness to you — I am not at liberty to disclose them right now.

Q. (Are they there right now. A. No, but we can get them in)

Q. Mr. Meehan, I have witnesses that saw you in the company of Maryann Birks, also known as Maryann Foley. Saw you on the church steps with Maryann last night around midnight? These are two separate witnesses that know you for several years. They know you, and they [34] are positively sure that it was you, so I feel that is the reason why you are in here. These witnesses are going to be confronted with you, and it is going to be — I know that they are reliable witnesses, and I have no reason to believe that they are lying. As a suggestion, I think that you should think it over and use your own discretion. It is kind of a serious matter, and I think the truth is the best thing at this time? I hope that you are aware that Maryann Birks is dead? Do you understand that? Have you been informed about that? But you are under arrest right now. I have read you your rights? A. Under arrest for what?

Q. For the death — Right now for the suspicious death of Maryann Birks? I know that I am expecting to hear from the Medical Examiner, Dr. Curtis, and there is no doubt in my mind that she come about her death as a result of violence. Consequently it is a murder? I am telling you that these witnesses did see you, and I can't say anything more than that? I just want you to realize that. A. Can I see who the witnesses are who identified me?

Q. I have no reason to hold them back, but I don't think it is incumbent upon me right now to do it. I am telling you this, and I am certainly not telling you on the tape machine here that I am lying. I wouldn't jeopardize myself. This is too serious a matter, but I do have witnesses. I will in time bring them before you, to be confronted with you. I can verify that by these officers, Sgt. Feeney and Det. Madden, that we have talked to these witnesses, and they told me you were with her, sitting on the steps. I am sure I am not fooling around. I am not trying to trap you in any shape or form? A. I was with her last night at the stairs, but then I left.

Q. Well that's what we want. We are trying to get to the bottom, and we are trying to get to the truth of the matter. Now what time did [35] you meet Maryann Birks? A. 11:30.

Q. About 11:30. That would be on Thursday night? A. Last night.

Q. Last night, June 10th? Where did you meet Maryann Birks? A. I think it was in Billy's Saloon. Yea Billy's Saloon.

Q. What time did you arrive at Billy's Saloon? A. Maybe eleven.

Q. About 11 o'clock? Did you go in there alone? A. Yea I went in there.

Q. Was Maryann Birks in there when you went in? A. Yea.

Q. She was in there? O.K. Did you sit with Maryann Birks at that time when you went in? A. Yea, she bought me a beer.

Q. She bought you a beer? A. Yea. Then I bought her one.

Q. What type of beer were you drinking, by the way? A. Schlitz.

Q. (I wasn't in Billy's Saloon) Were you sitting in a booth or sitting at the bar? A. Sitting in a booth.

Q. Sitting in a booth? Just you and Maryann? A. Yea.

Q. She bought you a beer, and you bought her a beer? A. Yea.

Q. How many beers did you have? A. Just two.

Q. Just two? One that she bought and one that you bought? How long did it take you to consume the both beers? A. Maybe 15 or 20 minutes.

Q. Would that be about 11:15, 11:30? A. After.

Q. Around that time? Did you and Maryann have a conversation while you were having the beer? A. Yea.

Q. What was the conversation you had with Maryann? A. Well it was over where we could get some pot.

Q. Get some pot? A. Yea, marijuana.

Q. Do you use it occasionally? A. Yea.

Q. Do you know if Maryann used it? A. Yea.

Q. On occasion. O.K. A. That's the reason why we went in there looking for some.

Q. You were in Charley's looking for some? A. Not Charley's Billy's.

Q. In Billy's? O.K. [36] A. There was no one in there really.

Q. How much money did you have on you? A. I had about a dollar.

Q. How much, do you know, did Maryann have on her? A. I don't know.

Q. Tell me, Joe, while we are on the subject, how were you dressed last night? A. I had on dungarees.

Q. You had on dungarees? Were they denim's? A. Right.

Q. How about a shirt? A. I was wearing a red BVD. You know the pocket type.

Q. You were wearing a shirt? A. Yea like a T shirt, with a pocket in it, and it is red.

Q. Did you wear those sneakers that you had on this morning? A. Yea.

Q. You had those on? When you were with Maryann Birks you had the same sneakers on? A. Yea.

Q. At any time, did you have your shirt off? A. No.

Q. You never took off the red T shirt? A. No.

Q. And you say you wore a T shirt? A. Yea.

Q. You are positive of that? A. Yea.

Q. So approximately what time did you leave Charley's? A. Billey's.

Q. What time did you leave Billey's? And you were in the company of Maryann? Right? A. Right.

Q. What time did you leave Billey's after you had the two beers? A. Oh it must have been around quarter of.

Q. You say quarter of 12? A. Uh huh.

Q. So where did you go from there? Up to the stairs.

Q. Up to the steps of the church? A. Uh huh.

Q. What did you do? Did you sit on the steps? A. Yea.

Q. Sat on the steps? What was the conversation? Was there anybody around when you sat on the steps? Nobody around? All right.

Q. Was Maryann sitting on your right or your left on the steps? A. I think it was my left.

Q. On your left? A. Yea.

[39] Q. Did you have your arm around her? A. No.

Q. At any time while you were sitting on the steps? A. No.

Q. You never had your arm around her? How long did you stay on the steps of the church? A. Oh, 15 or 20 minutes.

Q. Did you incidentally when you left Billey's Saloon, what door did you leave by? A. The rear.

Q. The rear door? And then through the alley? A. Yea.

Q. What was the conversation you had in the 15 or 20 minutes you were on the church steps with Maryann? A. About where we would get some pot.

Q. Did you talk? Was there anything else? A. No. I said I am not going to sit here. I am going home, and she said she was going home, so I went up the corner again.

Q. Did you and Maryann walk? Leave the steps and walk together? A. No she went up towards her way, and I went down towards the square.

Q. When you got off the church steps, which direction did Maryann go? A. (Indicating)

Q. Which street is that? Maple Street? She went up Maple Street towards Oak Street? A. Yea.

Q. Where did you go? A. I went down toward the square.

Q. You went the opposite direction? A. Yea, down to the square.

Q. Down to the square? Did you walk up Maple Street on the way to the square? A. Why should I?

Q. I don't know. I was just asking you if you went that way?

Q. Where did you go after you left Maryann? A. I went up to the train depot up there.

Q. Where? A. The train depot, on River Street there.

Q. What did you go up there for? A. To see if any kids were around.

Q. Did you see any kids around? A. No.

Q. You didn't meet anybody? A. No. Then I went home, when I found there was no one around.

[38] Q. What time did you arrive home? A. It must have been then about quarter of.

Q. About quarter of one? A. Maybe one. I didn't look at the clock.

Q. When you went in the house, did you see anybody? A. No. Everyone was sleeping.

Q. When you left Maryann at the church and you walked down toward the depot, toward the square, did you pass by Brigham's? A. Yea.

Q. Brigham's Ice Cream place? A. Yea.

Q. Was there anybody hanging around there? At that time? A. Not that I know of. I didn't see anyone.

Q. So what is the fair estimate of the time that you walked by Brigham's after you left Maryann? A. Maybe five minutes. I don't know. It doesn't take that long to get to the square.

Q. What time would you say that would be around? Some time around 12 o'clock? A little after 12? A. Yea, maybe.

Q. But there was nobody there you knew? A. No.

Q. There was nobody there in front of Brigham's? A. Oh maybe there might have been. I don't know. I didn't look.

Q. You didn't see anybody there? A. I didn't look.

Q. Joe, you realize the seriousness of this thing that you have been arrested for? You understand that? A. Yes.

Q. Now when you were with Maryann drinking beer and you went up to the church steps, what was Mary wearing? As far as clothing goes? What type of pants was she wearing to start off with? Was she wearing pants or a dress? A. I think pants.

Q. Pants? A. Yea.

Q. Light colored? A. I don't know. I didn't even notice.

Q. Do you recall what kind of shoes she was wearing? A. No.

Q. You don't recall any type of clothing she might have been wearing? A. No.

[39] Q. None? A. No.

Q. Did she have a handbag when you were with her? A. Yea I think so.

Q. What type of a handbag was it? If you recall? A. I don't know. One of those big ones.

Q. A big one? Do you recall the color? A. It might have been denim, like the dungarees. I don't know. Just a big, big thing.

Q. Is there anything else, Joe, that you would like to tell us? A. No.

Q. When you left Maryann Birks at the church, was she alone? A. Yea, I think so.

Q. You say she was heading home? A. That's where she said she was going.

Q. And was she heading in the direction of her home? A. I think so. I don't know where she lives. I don't know if she lives on Oak Street or Pine.

Q. Do you know where Easton Avenue is? A. Yes.

Q. Was she heading in that direction? As if she was going to Easton Avenue? A. Yea, she was going up Pine when I last saw her.

Q. Wait a minute now? A. I got whacked out last night.

Q. Where were you? Down at Downey's? A. (Voice in background) He was on downers.

Q. Downers? You were on pills? A. (Voice in background) This is one of the things we are asking you all right? This is one of things we are asking you?

Q. All right. You were on downers? And you were drinking beer with one of the downers? A. They were vallums.

Q. They are a form of a pill? A. Yea.

Q. So how many of those pills did you take — roughtly? A. About 15.

Q. Is that the usual amount that you take or is that a little excessive? A. They were five milligrams.

Q. Five milligrams? O.K. Then you had a few Schlitzs? In other words. [40] A. Up the corner I had a Schlitz.

Q. So then you were feeling pretty good then? You were high? A. Yea.

Q. Do you want to tell me what happened Joe? A. About what?

Q. About the pills and you met Maryann, as you said it before? You told me you didn't see her; now you tell me you were on the church steps with her? You admitted that, right? If you were high as a kite, are you trying to tell me that nothing happened between you and Mary? A. Yea.

Q. Are you sure of that? A. Yea.

Q. Well I don't know what to say to you, Joe? I told you all about what we had here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about?

Q. Joe somebody said to me that you wanted to ask me a question? Is there something you want to know?

Q. (Det. Madden) Well he did say "Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be." We have no control over that. We go in and present the facts. Anyway we are here to help.

Q. Joe, from what you tell me right here now I can't promise you anything. I can't say I am going to do this or I am going to do that. I can't do that because it is not within my providence, and I have no jurisdiction over anything like that. What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant, in the presence of Detective Madden, myself and Sergeant Feeney, that he was very co-operative, he told us the truth, he had a few things that weren't correct; he corrected himself on them, and he came out and he told us the whole truth. I can honestly say that he co-operated to the fullest. You realize the seriousness of it. What good it is going to do, to tell the truth, I can — the court is going to [41] be well aware of your truthfulness, but I can't say that you are going to get a break. I just can't do those things. I can tell you that the court, in the past experience, that the court looks

upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way, and that's all I can tell you. I will bring it to the attention of your attorney, the District Attorney, the local court judge and right up the line, for whatever develops out of it. The fact is all I can promise you is that I will tell the truth and the fact that you co-operated, but I can't promise you anything. I can't put it any fairer than that. We co-operate with the attorney. Insofar as the defense attorneys go, we give them anything that they want and we discuss it with them openly and freely. We don't hold anything back. If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it that I cannot promise you anything now. I don't intend to kid you by saying yes. I will get you this or get you that. I just can't say that. I can bring it to the attention of everybody concerned. When I say that, I mean the District Attorney, the Judge and everyone else. That's all I can do. So if you wish to tell me about it, I will listen, and I promise you what I would do. I will say that in the past it has helped, others in the past. I have been around for a few years, and I have had a little experience along these lines. One thing, don't get the impression I am trying to con you, because I am not. What else can I say. Anything else you want to know? A. Can I go home and get some clothes?

Q. We will see that the clothes come to you? No problem there? We will get you some clothes? Anything you request? We will get you the clothes, anything you want? If you were drinking — you told [42] me you were on those pills and everything else. I don't know what bearing that would have on it? Are you still — A. High from last night, a little jiggy.

Q. But you still understand me, don't you? A. Yea.

Q. You understand what I am talking about? That's the important thing. I don't want to be talking to someone who

doesn't know what is going on. I just want you to know the seriousness of it and what I said before. If you wish to tell the story, I am sure it will help you.

Q. Do you wish to tell me what the story was Joe? A. Yea, but if I tell you right, it is going to come out in the court.

Q. Joe it is going to come out in court eventually. It is going to come out through witnesses, through evidence, stuff like that? As I said before, we are not holding you here on a little thread of evidence. We have a good case here. I am no attorney. I am only a policeman, but we certainly have a case. As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case. So it is up to you Joe? A. I don't know.

Q. You don't know what? Is there some question you want to know? I wish I could promise you the world, but I can't. I am certainly not going to promise you something that I cannot fulfill just for the sake of this. This is serious; this is my job, and I wish I could, but I am certainly, like I told you before, I will spread the word. I will take the stand under oath and I have nothing to hide. I have had many a time that they ask me and the defense makes a pitch that my client was co-operative with the police — postively absolutely I would never deny that if that was the case. I have told you about the witnesses. I have told you about that; I wasn't hiding anything. I came out with it.

Q. Joe do you want to tell us about it? Did you say that she provoked you? Is that my understanding? A. Yea.

[43] Q. Will you tell us in your own words? A. I was high on the valiums and everything.

Q. What did you say again? A. High on the valiums and drunk, you know, a few 6 packs. You know she was making fun of me and everything and I flipped out, you know.

Q. Did you want to have intercourse with her? Was she kidding you about that part of it or what? A. Yea she said she would, but, you know —

Q. Did she want any money or anything? A. No.

Q. Well tell us what happened? When you left the church, did you go up Oak Street? A. Yea.

Q. Yea and were you looking for a spot to go to? A. Yea.

Q. Did you have any place in mind where to go or anyplace up on the street? A. Anyplace.

Q. But you did stop in front of #40? I don't know if you knew it was #40. It was on the grass lawn there, right? You know what I am talking about? At the side window, there is a grass lawn? Were you on the grass with her? A. Yea.

Q. Did you both sit down and lay down there or what? A. We were sitting down, you know, and she refused me, and I just flipped out?

Q. What did you ask her? A. Just sit down and did it on, you know. A. In other words, you wanted to get laid? A. Yea.

Q. What did she say to that? A. She said no.

Q. Were you upset about that? That you wanted to have intercourse? A. Yea.

Q. O.K. Then she refused you? Why did she refuse you? A. Oh, she said I was too young.

Q. She said you were too young? A. Yea.

[44] Q. So what did you do then? You say you flipped out? What did you do then? Did you strike her? A. Yea, I hit her.

Q. What did you hit her with? A. You know, I kicked her.

Q. Oh, you kicked her? And did you have those sneakers on that you had on earlier? You kicked her? Where did you kick her? In what part of the body? A. Kicked her in the head?

Q. Was she laying or sitting down on the grass at this time? A. Well when I kicked her, you know, I guess she was weary like dizzy so I just kept on kicking and kicking her. I didn't think I killed her.

Q. Kept on kicking her in the head? A. Yea.

Q. In the face? A. Yea.

Q. Was she unconscious after you kept — how many times do you think you kicked her? A. Oh, maybe several times.

Q. Several times? Would you say more than five times? A. Yea.

Q. Would it be more than ten times? A. No.

Q. Say between five and ten times, somewhere in that vicinity, over five but not ten? A. Yea.

Q. After you got through kicking her, what happened then? Was she unconscious? A. Yea.

Q. Prior to kicking her, did she make any outcry or yell at you, scream? A. No, because I figured she was unconscious.

Q. When you discovered that she was unconscious, Joe, what did you do then? A. I ran.

Q. You ran? Where did you go then? A. I ran home.

Q. Ran home? Tell me, Joe, did you have occasion to walk down Oak Street toward Maple and go into the yard of the Thomas Funeral Home? A. No.

Q. You didn't go in there? A. No.

Q. At any time, did you take a rock and throw it on her after you kicked her? A. Yea.

[45] Q. You did? O.K. Then you — A. Does that mean I am railroaded in now, then to be convicted and everything now?

Q. No? A. Why are you patting me on the back?

Q. (voice in background) Because you are telling the truth?

Q. Listen, did you go down to the Thomas Funeral Home and take the rock out of the lawn and go back again? Did

you? It was one of those rocks near the flower bed? And when you went back to her, was she unconscious at that time when you had the rock in your hand? A. Yea.

Q. Did you hit her with the rock at that time? A. Yea.

Q. How many times did you hit her with the rock? A. Just once.

Q. And when the rock hit her, what part of the body did the rock hit her? A. I don't know. I just threw it and split.

Q. Threw it and split, meaning "did you walk away." A. Yea, I ran.

Q. In what direction did you go? A. Down towards the church there — down to the square.

Q. Down towards the church? Down Oak Street? A. Yea.

Q. Towards Maple and down into the square? Right? What did you do after you left there? A. After I left the square?

Q. Yea? A. I went home.

Q. Did you change your clothes? A. No.

Q. Did you have a shirt on other than the one you told me about — the red shirt? A. Yea, I had this on. (indicating)

Q. You had this shirt on here? And is that the way you had it with the sleeves rolled up like that (indicating) A. Yea.

Q. But you had other pants on? Is that correct? A. Right, dungarees.

Q. Long dungarees? A. Yea.

Q. Where are those dungarees now? A. They are at home.

[46] Q. In what part of your home are they? Are they in your closet? A. Probably down with my weights, my weight lifting bench.

Q. Weight lifting bench? You took the pants off? Why did you change the pants? A. Because I was going to bed.

Q. Because you were going to bed? O.K. But those are the same sneakers you had on? Anything else, Sgt. Feeney?

Q. Is there anything else Joe that you wish to tell us, any more than what you have already told us? You were informed of your rights earlier? Is that correct? By the Detectives, also me? A. Yea.

Q. I told you whatever you told me in court, like including your rights, that you would be informed, that you voluntarily gave me the statement and told me the truth as to what happened. I told you that I would inform the court of that, and I intend to. In other words that you did this on a voluntary basis and the court would be informed of your truthfulness and that you came out and told us the story and the circumstances under which she died because of having intercourse with you she provoked you. (I think that's what you said) and that you flipped out? Is that what I think you said and that you kicked her several times, more than five, and that you then walked to the Thomas Funeral Home on the lawn and got a rock and came back and you threw it on her. You don't know where it hit her and then you took off down Maple Street — down Oak Street, past Maple, to the Square? Is that what you said? A. Yes.

Q. Did you have any sexual relations with her at any time at that time? Did you try to afterwards? A. No.

Q. Did you move or pull down any of her underclothes at any time? A. We did have intercourse.

Q. O.K. Was it before or after you kicked her? In other words, she resisted you and you forced her into intercourse? Is that what [47] you are trying to tell me? A. No I didn't force her.

Q. But you did have intercourse with her? A. Yea.

Q. Did you have it the normal way? A. Yea.

Q. Was she on her back or on her stomach? She was on her back at the time of the intercourse I assume? Right? A. Yea.

Q. This is a picture of the Thomas Funeral Home lawn, and that's where the brick is missing? We have the brick that was found up by the body of Maryann? Is that the location, if you recall? This is where you removed the brick? A. Yea.

Q. Then you carried it back to where she was lying? Right? A. Yea.

Q. Was the rock heavy? A. No it didn't seem heavy to me.

Q. But the rock I would say around ten inches by eight inches, eight inches wide? A. Well it was a rock.

Q. Well it wasn't a pebble by any means? In other words, it was a rock that you had to carry by two hands rather than one? With the weight of it, you wouldn't hold it in one hand for any distance, you know? A. Yea.

Q. Is there anything else, Sergeant? (Sgt. Feeney) Is it similar to them rocks? (indicating) A. Well it was dark, you know, maybe it was.

Q. This is what I am trying to figure? When you said you had intercourse with her, did you have intercourse after you kicked her? A. Gee I don't remember. I was so whacked out.

Q. You don't remembe. after you kicked her or after you hit her with the rock or before? You are not sure? A. I am not sure.

Q. In other words, it could have been after she was kicked and hit with the rock? A. No. I don't know. I was so messed up.

Q. You mean the pills make you messed up? You are not quite sure whether you had intercourse with her prior to kicking and hitting her with the rock or after?

[48] Q. O.K. You gave this voluntarily, this statement. This is the truth. Am I fair in saying that? A. Yea.

Q. You did this on your own voluntarily, and it is the truth? That's what I am trying to get? Am I right? A. Yea.

Q. You weren't promised anything? I didn't promise you any kind of a lighter sentence or anything else. I did say that I would bring this before the court of the fact that you did voluntarily tell the truth about this, that you didn't hold anything back.

Q. O.K. Thank you very much, Joe?

COMMONWEALTH OF MASSACHUSETTS.

SUFFOLK, SS. SUPERIOR COURT
INDICTMENT No. 03504

COMMONWEALTH OF MASSACHUSETTS

v.

JOSEPH D. MEEHAN

Memorandum of Decision with Reference to Motion to Suppress Evidence.

1. On Friday, June 11, 1976, at about 6:30 A.M., there was found on the front lawn of 40 Oak Street, Hyde Park, the body of the victim, one Mary Ann Burkes, maiden name Mary Ann Foley. The deceased was found lying face-down with her white pants below her buttocks, her personal belongings including a large handbag being strewn on the ground near the body. The victim's head was covered by blood, and after the body was removed from the ground there was blood on the grass. A large rock was found near the body of the deceased and a photograph of this rock with blood on it, as well as the rock itself, were introduced into evidence.

2. The defendant filed a Motion to Suppress to which was appended an affidavit of the defendant Joseph D. Meehan, as well as an affidavit of Walter J. Hurley, Esq., counsel for the defendant. This Motion to Suppress and its appendages are incorporated by reference as part of this Memorandum of Decision.

3. I shall now deal with the specific questions which have been raised by the defendant by means of the Motion to Suppress. (A) *The arrest of the defendant*. I rule that the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder, without a warrant, when the said defendant was at Station 5. I further rule that the defendant Joseph D. Meehan was not arrested while he was walking on Hyde Park Avenue at the time the police drove up to him and asked him to come to the station for questioning.

4. With reference to the above two rulings which I have just made, I make the following findings of fact on which I have based these findings.

5. When the police learned about the existence of this homicide in this case and after the body had been examined at 40 Oak Street, the police proceeded in the direction of initiating immediately an ongoing investigation. At the outset the investigation proceeded in two directions. The first aspect of the investigation was that the police undertook to make an inquiry of the neighbors who resided in the neighborhood of 40 Oak Street, the location at which was found the body of the deceased. Another aspect of this investigation was to undertake to learn who was in the area of Cleary Square on the evening of June 10th and the early morning of June 11th, and upon ascertaining the identity of these individuals to have them come to the station to be interviewed and questioned in order to see if they could assist in the progress of this investigation.

6. With reference to the interviews of the people who lived in the neighborhood of 40 Oak Street, several people were questioned by the police and this group included Clare Wilde, Mary Crowley, Nina Giardini, Eleanor Stella and Jean McCarthy, the daughter of Eleanor Stella. The witness Wilde, at about 2:00 or 2:30 A.M. on the morning of June 11th, was awakened by the sound of a barking dog, got up from bed and

heard a tapping noise. While she was looking out her second-story bedroom window, she saw a white male walk by her house in the direction of the Most Precious Blood Church. She described the white male as probably in his mid-twenties, about five feet ten, medium-slender build and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up. She did not see the face of this man as he passed within her view. Three or four minutes later the man returned and she heard what she described as the sound of a large boulder. There was a bush on the lawn of 40 Oak Street which prevented her from seeing the body of the victim.

7. Another witness in the neighborhood was Mary Crowley, the mother of Clare Wilde, who heard a woman scream, "Don't. Please don't." She then heard dogs barking and a tapping noise.

8. At the same time, Officer Feeney was in charge of that aspect of the investigation which was designed to bring to the station young men, known to have been in Cleary Square during the evening of June 10, 1976, and early in the morning of June 11, 1976. The police effort in this direction was designed to get information concerning this crime. A number of young men were brought into the station, to wit: Joseph Ventola, Francis Hughes, John Carroll and Joseph Meehan. Another young man came in on his own initiative because he heard that the police were looking for him; namely, George Quish.

9. Ventola and Carroll came to the police station because the police sought them out, Ventola being at his place of employment and Carroll being at his home at the time the police contacted him. The police informed these two young men that the police were investigating an assault on a woman in Cleary Square on the night before and each one was being asked to accompany the police to the station in order to answer

questions. In addition, one Francis Hughes was also brought to the police station.

10. Ventola knew the victim because he saw her walking her dog near his place of employment, Cooper's Auto Body, Eastern Avenue, Hyde Park. He had seen the victim in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of the Christ Church. He described the white male as seventeen or eighteen years of age, "skinny," with blackish-brownish hair that came to about an inch below the ears and the male was wearing no shirt.

11. Carroll came to the police station and was interviewed in the Detectives' Room in the presence of Detective Solari. The Detectives' Room faces the front of the District 5 Police Headquarters on Hyde Park Avenue. Carroll had seen the victim, whom he had known at school, in the company of one Joseph Meehan whom he, Carroll, had known for six or seven years. The victim and Meehan were sitting on the steps of Christ Church between 11:30 P.M. and 12:00 midnight on the evening of June 10, 1976. As this interview was in progress, Carroll looked out the window of the Detectives' Room and remarked that an individual, thumbing a ride outside the police station at that time, was Joseph Meehan. Detective Solari immediately left the District 5 building by way of a window which was about four feet above the level of the sidewalk. Officer Cannon and Detective Russo left the building by the front door and Cannon got into an unmarked police car in front of the station, made a U-turn, and with Detective Solari in the vehicle proceeded up Hyde Park Avenue in the direction of Joseph Meehan. This car was used so that if Meehan were successful in hitching a ride, the officers intended to follow the car. Officer Russo walked up the sidewalk after Joseph Meehan.

12. Officers Solari and Cannon, in the police car, pulled up alongside Joseph Meehan and did not get out of the car, but Officer Cannon talked to the defendant. He told the defendant that the police were investigating an assault on a woman and they were questioning all the young men who were known to have been in the neighborhood the previous evening and they found out that Joseph Meehan had been there and asked him if he would come back to the station to be interveiwed. Meehan answered in the affirmative but indicated that he was on the way to the Unemployment Office in order to take care of an unemployment matter affecting him and Meehan was told that the police would drive him there if he were delayed. The defendant Meehan opened the rear door of the police car and climbed into the back seat, and Officer Russo got into the back seat with him and they all drove back to Station 5. This occurred at about 10:30 A.M.

13. The description of an individual which had been obtained from the persons on Oak Street was as follows: He was wearing blue dungarees, a blue shirt with a print on it, was eighteen to nineteen years old, was slim and no mention was made of his height. At the station observations of the defendant indicated that he was wearing cutoff dungarees, a blue shirt with the sleeves rolled up and a print on the shirt.

14. At the District 5 Headquarters, Solari sat down, facing Joseph Meehan, for the purpose of interviewing the defendant. At the same time Detective Cannon pursued his duties in connection with the investigation and then undertook to interview one George Quish who had come to the station because he had heard that the police wanted to talk to him.

15. When Solari sat down facing Meehan, he was about one and a half feet away from Meehan. The defendant sat down and crossed his legs and Detective Solari observed a rust-colored stain on Meehan's sneakers. The officer's experience suggested to him that this might well be blood and he asked

Meehan what was the stain on his sneakers. Meehan responded that it was probably mud from the pond in Dedham where he had been swimming the day before. Solari responded that the stain looked like blood to him and Meehan said that if it were blood, the blood belonged to George Quish because he had a fight with George Quish some time ago. Officer Solari asked Meehan if he could have his sneakers and Meehan took his left sneaker off and handed it to the officer. Immediately thereafter, the sneaker was subjected to chemical examination and tests by the Police Department chemist, one Stanley Bogden, and his tests indicated that the stain was blood. At the same time and inasmuch as Quish was then in the station being interviewed by Officer Cannon, Sergeant Feeney asked Officer Cannon to question Quish as to whether or not he had had a fight with anyone recently. Quish denied that he had had a fight but stated that the cut on his nose was as a result of falling down drunk some night a week before.

16. Thereupon, the defendant Joseph Meehan was placed under arrest.

17. I have recited these facts at some length in order to demonstrate that in my judgment the police had the requisite probable cause to arrest the defendant Joseph Meehan for murder and to do that without a warrant while at the police station. I find and rule that at the moment of his arrest, the arresting officer had knowledge of facts, based upon reasonably trustworthy information, sufficient to warrant him as a prudent man in believing that Meehan had committed this crime.

18. This recitation of facts also is designed to indicate that I came to the conclusion that when the police drove after Joseph Meehan on Hyde Park Avenue and asked him to come back to the station where the officers were questioning a group of young people who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, that the defendant voluntarily agreed to come back to the Police Headquarters at District 5 and was subjected to no restraint of any sort. For these reasons, then, I have ruled that the arrest of Joseph Meehan occurred at the District 5 Headquarters as stated above and that that arrest was based upon probable cause and therefore it was not necessary to obtain a warrant for his arrest. And for like reasons I have ruled that the defendant was not arrested in the course of the occurrences recited above on Hyde Park Avenue preceding the defendant's return to the District 5 Headquarters with the police in order to be interviewed. I rule, as well, that the arrest of Joseph Meehan as described above was a legal arrest and on that basis the arguments of the defendant which had been made and based upon the premise of an illegal arrest are no longer discussed by me in that they fail for the reasons stated above. In addition to the above, I rule that the activity which occurred on Hyde Park Avenue on the morning of June 11, 1976, with reference to the police car and the officers and Joseph Meehan were actions taken by the police in connection with an ongoing investigation and that at that time the defendant was asked to come back to District 5 Headquarters with all the other men who were known to have been in that vicinity on the evening of June 10 and the early morning of June 11, 1976. In addition, I find and rule that in any event Joseph Meehan voluntarily agreed to go back with the police to District 5 Headquarters in order to be interviewed with this group of young people which I have just described. I find that the defendant's liberty of movement had not become restricted by the action of the police, nor had he, in effect, submitted to the authority and control of the arresting officers, and for that reason he went with the police to District 5 Headquarters voluntarily.

19. (B) *The sneakers of the defendant.* In view of my rulings above and the facts recited above, I find and rule that the

defendant Meehan voluntarily turned over his sneakers to Detective Solari at the request of the latter. Indeed, I find and rule that the defendant was not in custody by way of arrest at the time the defendant voluntarily gave his sneakers to the detective. The defendant's counsel has theorized as to what would have happened if Meehan had declined or refused to return to Police Headquarters. The facts of this case, as I have found them, make such speculation immaterial and further discussion thereof unnecessary.

20. The fact that the police reacted with speed when Meehan's thumbing a ride on Hyde Park Avenue was brought to the attention of the police officers and the fact that the police cars were in the ready-to-use position, point to an efficient and alert police action, particularly as they were in the initial stages of investigating what appeared to be a brutal homicide which had just been brought to the attention of the police.

21. Of course the ordinary citizen is called upon to assist the police in connection with their investigation of a crime. It is the duty of every citizen to assist the police in that direction and up to the point of self-incrimination. When the police caught up with Meehan on Hyde Park Avenue, he was one of a group of young men who were known to have been in the Cleary Square vicinity on the evening of June 10 and the early morning of June 11, 1976, and who were being brought to District 5 Headquarters to be interviewed and possibly to render assistance with reference to this crime. I find that this was the posture of the defendant Meehan at that time.

22. (C) *The defendant's statement to the police.*

a. Was it voluntary?

b. Was there any violation of the Miranda rule, so-called?

23. I have already ruled that the arrest of the defendant in this case was a legal arrest, made upon probable cause in compliance with the law. Therefore, I do not deal with the de-

fendant's statement on the subject of inculpatory admissions on the basis of an illegal arrest, as has been argued in part by counsel for the defendant.

24. In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976, (a total of twenty-four tablets) and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer: Such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up of tolerance in a constant drug user: the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his responses thereto: the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Kelly, as contained in Exhibit 14, Pages 29 to 48, inclusive.

25. On the basis of the above, I find and rule as follows:

A. The Commonwealth has not satisfied the burden of proving that the defendant waived his rights *intelligently, voluntarily* and *knowingly*. The defendant's one-word responses to each of the said warnings, indicate to me nothing more than that the Miranda warnings were recited to Meehan and he apparently heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to constitute a waiver of these very vital rights of a defendant. The requirement that a waiver be made *intelligently, voluntarily* and *knowingly*.

requires something more than "Right," "Yes," and/or "I waive." For example, the Judge must be satisfied that such waivers were made "knowingly": It must appear in some way that a defendant knows what each right means with reference to him and the present charges against him; he must do something more than acknowledge the mere reading of each of these constitutional rights and give an affirmative statement such as "Yes" or "Right" to the query that he "understands that" which has been read to him. There is no statement that having understood the reading of his "rights" to him that the police are obligated to respect his insistence on his rights if he asserts his rights. And thereafter to finalize the cutoff from the defendant of his constitutional rights by means of the question: "Are you willing to talk to me about Mary Ann Burkes?" Answer: "Yes," and with the completeness and finality which the government asserts opens up the entire charge of murder and exposes the defendant to the serious and life-long consequences that would follow, is entirely too deadly an application of what is supposed to be a procedure whereby one can defend himself by silence against an almost overpowering set of circumstances. Such a rote reading of the "Miranda card rights" makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual. This Court is unable to infer that this eighteen-year-old defendant, with moderate and limited schooling, after riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between the two doctor experts, with the dimness of his sense of judgment still hanging over him, was even aware of the significance of his rights, much less the significance of his waiver of these rights. And the fact that he knew his name and address, and where he lived, his age and telephone number, is hardly an adequate basis for saying

that the defendant should therefore be held to have intelligently, voluntarily and knowingly waived his priceless rights he enjoys by saying "Yes" to the question, "Are you willing to talk to me about Mary Ann Burkes?" For this question to constitute the key to this waiver is strange, because the wording of this question itself is peculiar. The Miranda warning does not prohibit talking about the victim, but about the crime committed upon the victim. A literal application of the government's standard of interpreting the effect of the defendant's responses of "Right" and "Yes," would suggest that his answer of "Yes" should limit his willingness to talk to Sergeant Kelly about Mary Ann Burkes, but not of the manner in which she met her death nor with reference to the crime of the homicide of the victim, each of which would appear to require a more appropriate and direct question and answer. A shallow interpretation of such rule as the Miranda warning requirement without some evidence that the defendant intelligently, voluntarily and knowingly "waived" these rights, is almost to say that there is no rule at all.

26. In addition, there is no evidence that the defendant was told that he could make a telephone call to his mother or anyone else. And the eighteen-year-old male, coming out of a bout with Valium and not being smart enough to ask for or even think of it, should have been given the opportunity to use the telephone.

27. I think, in addition, that the most telling aspect of the defendant's statement, with its confessions, etc., is a transcript of the questioning of the defendant itself. I make reference to Sergeant Kelly's routine recitation of the constitutional rights to the defendant on Pages 29 and 30; the defendant's one-word answers thereto; on Page 33, the defendant *wanted to see* the witnesses who said he was with the deceased on the church steps the previous night; Page 33 and 34, that there were two

separate witnesses who were stated to know Meehan for several years, that they are positively sure that it was Meehan and that is the reason you are in here; and there follows lines of ominous expressions, then a suggestion to think it over but Meehan was given no time to do so; then telling the defendant he is under arrest and a reference that the defendant had been given his rights, and the defendant's response was "Under arrest for what?"; the defendant asked again to see the witnesses who identified him. Then Sergeant Kelly adds "I am sure I am not fooling around. I am not trying to trap you in any shape or form"; then on Page 39 Sergeant Kelly asks "Is there anything else, Joe, you would like to tell us?" and the defendant Meehan's response was "No." And nevertheless Sergeant Kelly proceeded right along with the questioning, ignoring what had just been stated to him by the defendant; the defendant further told Sergeant Kelly that he "Got whacked out last night . . . on downers . . . Valium"; on Page 40, after Meehan denied anything happened between the victim and himself, there follows three statements by different police officers with no answers by the defendant. For example, just above the middle of the page on Page 40, the question: "Well, I don't know what to say to you, Joe. I told you all about what we have here. I told you about the witnesses, the door you went out. I don't know what more I can talk to you about." (No answer by the defendant.) The next statement in the transcript under question, "Joe, somebody said to me that you wanted to ask me a question. Is there something you want to know?" (No answer by the defendant.) Question: (Detective Madden) "Well, he did say, 'Suppose I tell you that I did it, you know, what bearing would that have on the case and what degree it would be.' We have no control over that. We go in and present the facts. Anyway, we are here to help." (No answer by the defendant.)

28. The next question appears to be a statement by Sergeant Kelly which begins at the lower third of Page 40, and goes down to the fifth line, inclusive, on Page 41. The next entry in the transcript on Page 41 under answer is the defendant's statement, "Can I go home and get some clothes?" And Sergeant Kelly's next question begins, "We will see that the clothes come to you. No problem there," etc.; going over to Page 42 of the transcript under the word question, "You told me you were on those pills and everything else. I don't know what bearing that would have on it. Are you still —", end of the question. The defendant Meehan responded "High from last night. A little jiggy." "But you still understand me, don't you?" Meehan's answer, "Yea." And when Sergeant Kelly asked, "Do you wish to tell me what the story was, Joe?" The defendant's answer, "Yea. But if I tell you, right, it is going to come out in the court?" Thereafter Sergeant Kelly makes a statement of how they have a good case and so forth, and Meehan's answer is, when Sergeant Kelly says "So it is up to you, Joe," his answer is "I don't know." And thereafter Sergeant Kelly begins the next paragraph with the statement, "You don't know what?" And then the transcript proceeds for eight or ten lines concluding that, "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." On Page 45 the defendant Meehan's answer to the question "You did? Okay, then, you —", that being the end of the so-called question, Meehan's answering being "Does that mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelly's question, so-called, answers "No." And then the defendant Meehan said, "Why are you patting me on the back?" And the question (voice in the background) "Because you are telling the truth."

29. I have made these references to the statement of the defendant in the transcript in order to indicate that I came to

the conclusion that the defendant didn't really appreciate what was happending to him at that time and how much danger he was in at the hands of this very skillful police interrogation man. Sergeant Kelly indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven with long, many faceted statements, presumably supposed to have been in the form of a question and in these statements many different issues were referred to and raised, and in some instances the defendant merely responded "Yes" or "Yea." I find that Sergeant Kelly succeeded, and to use his own term, in trapping the defendant into making affirmative responses to questions, supposedly, which were so complex in form that an intelligent person would be incapable of knowing which aspect of Sergeant Kelly's statement the defendant Meehan was responding to. There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything. In addition, when the defendant Meehan asked the several questions to which I made reference, Sergeant Kelly proceeded to brush right over them, particularly the statement in which Meehan was asked, as reflected on Page 39 of the transcript, "Is there anything else, Joe, that you would like to tell us?" and the defendant Meehan's answer was "No." At this point I rule that Sergeant Kelly was obligated under the rationale of the Miranda warning decision to halt immediately any further questions of this defendant. Sergeant Kelly proceeded to ignore that assertion and I have concluded that the defendant was incapable of competing with this type

of assault upon his mind and completely unprepared and incapable of asserting and insisting upon his rights under the Constitution. I find that Sergeant Kelly, in his very skillful and effective manner, completely overpowered the defendant Meehan so that he had no trouble at all in getting the defendant Meehan to agree to anything. The rationale of the Miranda warning decision is such as was designed to protect a young defendant, such as the defendant Meehan in this case.

30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety. In order that anyone making reference to this decision may have access to the interview of the defendant Meehan by Sergeant Kelly, I hereby incorporate by reference that part of Exhibit 14, beginning on Page 29 and concluding on Page 48. of that exhibit.

31. (D) *Miscellaneous.* There are other questions which have been raised by counsel for the defendant to which I shall make reference at this point. The defendant's counsel asserts that the defendant was denied effective assistance of counsel. There was no evidence that the defendant was informed that he was entitled to make a telephone call and, of course, I am unable to determine whether he would have called his mother or a lawyer. Nevertheless, the defendant's lawyer appeared on the scene at about 5:00 o'clock in the afternoon on June 11, 1976. After he talked to the defendant, he left at about 6:00 P.M. to take care of his Little League responsibilities and returned thereafter at about 11:00 P.M. Inasmuch as there is

no reference to the defendant attempting to call a lawyer or his mother or being denied this right, and at the same time there was no indication, as the government argues, that the defendant was discouraged concerning the question of a lawyer, I cannot impute to the police anything with reference to this particular aspect of the case and, therefore, I cannot rule that he was denied effective assistance of counsel. It appears that his lawyer wished to talk to the defendant and without the presence of a security officer, who is required under the Boston Police Department rules and regulations, to keep a prisoner such as the defendant who was in custody under his immediate control. The police officer informed the attorney that the rules of the Boston Police Department did not permit him to absent himself from the presence of the defendant or to remove himself so that he would not have a clear view of the defendant. I consider that to be an appropriate regulation of the Boston Police Department so that the security of a person who has been arrested on such a serious charge shall be maintained, particularly at this stage of the proceeding. I do not consider that to be an unreasonable regulation for the Boston Police Department to have, nor a position for the security officer himself to assert when the defendant's attorney wished to be left alone in District 5 with the defendant.

32. When the defendant's mother and his brother came to visit the defendant at District 5 Headquarters, there was some conversation between the defendant and his mother and brother. And I find that whatever statement was made spontaneously by the defendant to his mother, which was heard by a police officer, should not be suppressed for any reason presented by the defendant in this case. It is plain, and I so rule, that when a defendant makes a statement to his mother and/or brother or both of them such as has been claimed in this case and the questioning process has not been prompted or instituted by the police themselves, that when such statement

has been made and it is overheard by a police officer who is properly in the building and at the position he has assumed at the time, that such statement is not to be suppressed under those circumstances.

33. The defendant has raised, in addition, the question that when the defendant was at the police station his attorney requested a medical examination which would have included a blood test. There were no facilities for such an examination at that particular time at the District 5 Headquarters. And I rule that the failure to have a medical examination at that time and at that place does not constitute a deprivation of the defendant's rights under those circumstances. Counsel for the defendant has raised the question as to the validity of the warrant which the police obtained in order to get possession of the pants that the defendant was wearing at the time of the alleged incident. Inasmuch as the location of these pants was obtained as a result of the statement by the defendant to Sergeant Kelly which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well.

34. Therefore, with reference to the Motion to Suppress for the reasons stated in my Memorandum of Decision, the motion is allowed with reference to any statements of the defendant which appear in Exhibit 14, Pages 29 through 48, which is the statement of Joseph Meehan in its entirety as was obtained by Sergeant Kelly and which was dated Friday, June 11, 1976, and taken at 11:20 A.M. The defendant's motion to suppress the two sneakers, for reasons set out at length in my Memorandum of Decision, is hereby denied.

35. The defendant's motion to suppress the pair of pants which were seized at his home on June 11, 1976, for reasons set out in my Memorandum of Decision, is hereby allowed.

FRANCIS JOHN GOOD,
Justice, Superior Court.

Dated: August 5, 1977.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss.

SUPREME JUDICIAL COURT
FOR SUFFOLK COUNTY
No. 77-367 CIVIL

COMMONWEALTH OF MASSACHUSETTS

vs.

JOSEPH MEEHAN

Order.

This matter came on to be heard upon the Commonwealth's amended application for interlocutory appeal from the allowance, in part, of a motion to suppress, and defendant's cross-application for interlocutory appeal under G.L. Ch. 278, § 28E, and was argued by counsel on September 21, 1977. It having been determined "that the administration of justice would be facilitated thereby" an interlocutory appeal from the decision of the Superior Court for Criminal Business for the County of Suffolk on the defendant's motion to suppress as to the Commonwealth's amended application and defendant's cross-application for interlocutory appeal is granted.

I herewith, without decision, report the appeal to the Full Court for hearing.

PAUL J. LIACOS,
Justice, Supreme Judicial Court

September 28, 1977

SUPREME JUDICIAL COURT

COMMONWEALTH *vs.* JOSEPH MEEHAN.

Suffolk. December 5, 1978. — March 19, 1979.

Present: HENNESSEY, C.J., BRAUCHER, KAPLAN, LIACOS, & ABRAMS, JJ.

Constitutional Law, Admissions and confessions, Search and seizure, Waiver of constitutional rights. *Search and Seizure. Arrest. Waiver.*

Indictment found and returned in the Superior Court on August 11, 1976.

A motion to suppress evidence was heard by *Good*, J. Applications by the defendant and the Commonwealth for an interlocutory appeal were allowed by *Liacos*, J., and the appeal was reported by him.

Sandra Hamlin, Assistant District Attorney (*Paul A. Mishkin*, Special Assistant District Attorney, with her) for the Commonwealth.

Davis A. Mills (*Walter J. Hurley* with him) for the defendant.

KAPLAN, J. A Suffolk County grand jury handed down an indictment on August 11, 1976, charging the defendant Joseph Meehan with the murder of Maryann Birks. The defendant moved before trial to suppress inculpatory statements made by him as well as articles of clothing belonging to him. Extensive evidence was received on voir dire, including testimony from the defendant and medical testimony dealing with the extent to which the defendant's perceptive ability was impaired when he made the statements. The judge filed lengthy findings which grounded his order granting the motion in part and denying it in part. Thereupon the Commonwealth applied under G.L. c. 278, § 28E, for leave to take an interlocutory

appeal from so much of the order as granted suppression, and the defendant made a similar application with respect to the denial. A single justice of this court granted both applications, and we are thus required to review the several parts of the order. The order will be affirmed except for one feature which in our view merits reversal.[1]

Drawing on the findings and the underlying record, we state some of the facts at this point, reserving the rest for the later discussion of particular issues.

About 6 A.M., Friday, June 11, 1976, police officers found the victim's body on the front law of 40 Oak Street in the Hyde Park neighborhood. The face and head were covered with blood; a large rock found near the body was spotted with blood. Promptly the police attempted to interview individuals living near 40 Oak Street, or known to have been at the nearby Cleary Square (evidently a familiar gathering place) on the previous night.

Of the former group, Mary Crowley, interviewed at her home on 38 Oak Street, said that about 2 A.M. that morning she was awakened by a scream, dogs barking, and a tapping sound; she heard a woman scream, "Don't. Please don't," and then a wordless scream. Crowley's daughter, Claire Wilde, staying at the same address, gave a similar account and added that, looking out the window, she saw a white male walk by the house; he was about five feet ten inches, in his mid-twenties, had dark hair, and was slender; he was wearing faded jeans and his shirtsleeves were rolled up. Some minutes later the man returned and she heard what she described as the sound of a large boulder being thrown on the lawn. She

[1] The defendant has not briefed or argued certain assignments of error and they are considered waived. S.J.C. Rule 1:13, as amended, 366 Mass. 853 (1974). See *Commonwealth* v. *Watkins*, Mass. , & n.2 (1978) (Mass. Adv. Sh. [1978] 1646, 1647, & n.2), and cases cited; Mass. R. A. P. 16, as amended, 367 Mass. 921 (1975).

did not see the man's face. The statements of these two witnesses were recorded on tape.

Also on the morning of June 11, four persons of the Cleary Square group were interviewed at District 5 police station on Hyde Park Avenue. Two gave material statements, also tape-recorded. Joseph Ventola, who knew the victim, said that around midnight he had driven past her; she was on the steps of Christ Church at 1220 River Street in the company of a white man, shirtless, in his late teens, "skinny," with dark hair. The second witness, John Carroll, said that between 11:30 P.M. and midnight he had driven by the victim and the defendant Joseph Meehan (both known to him); they were sitting on the steps of Christ Church; he described Meehan as eighteen or nineteen years old, five feet six, about 130 pounds, dark hair, wearing sneakers and a print shirt with rolled-up sleeves.

As Carroll was being interviewed about 10:30 A.M. in a first-floor room at the police station, he chanced, looking through the window near street level, to see the defendant trying to hitch a ride on Hyde Park Avenue and pointed him out to the police. Detective James Solari, one of the officers present, passed through the opened window to the street, while two other officers, William Cannon and Louis Russo, went by the front door. Russo walked up the street; Solari and Cannon proceeded in a police cruiser. The cruiser pulled up alongside the defendant. Cannon told him they were investigating an assault on a woman, were questioning those who had been seen in the area of the crime, and had been told that the defendant was there the previous evening. They asked the defendant to come with them to the station for an interview. The defendant said he was willing, but he was going to the unemployment office and did not want to be late. The officers answered they would drive him to the office if he should be delayed. The defendant opened the car door and took a rear

seat, where he was joined by the officer who had approached on foot. The defendant was eighteen, five feet six inches, 135 pounds, dark hair, wearing cut-off dungarees and a blue print shirt with rolled-up sleeves.

Officer Solari interviewed the defendant at the station. Sitting at a short distance from the defendant, Solari noticed reddish stains on the defendant's sneakers. In response to a question, the defendant said they were probably mud. When Solari said they appeared to be blood, the defendant said, if so, the stains were from a fight he had had several days earlier with George Quish. Solari asked whether he could inspect the sneakers. The defendant answered by removing the left sneaker and handing it to Solari. Leaving the defendant in the room, Solari took the sneakers and showed them to Sergeant James Feeney. Feeney agreed there were blood stains. It happened that Quish was being interviewed at the station at the same time. When asked by Sergeant Feeney whether he had been involved in a fight recently, Quish said he had not been. Feeney then instructed Solari to arrest the defendant and give him Miranda warnings, which evidently was done (there was no proof as to the manner of administering the warnings). A chemical test, made promptly, confirmed the visual judgment of blood.

About 11:20 A.M., the defendant was passed on to Sergeant Joseph Kelley (with Officers Feeney, Mark Madden, and Russo also present). Kelley gave the defendant Miranda warnings, and then followed an interrogation, interlarded with cajolings and assurances, which continued for perhaps an hour (almost all recorded on tape). Starting with his denial that he had been in the company of the victim on the night of the assault, the defendant was gradually brought around to admitting that he had kicked her, thrown a rock at her, and left her unconscious (as he thought) at the place where she was found. The circumstances of this confession were dealt with

by the judge in particular detail, and must be closely examined later in this opinion.

Mentioning the confession (and with some reference also to the statements of Claire Wilde and John Carroll previously given to the police), Officer Solari applied early that afternoon to the assistant clerk of the Municipal Court of the West Roxbury District for a warrant to search the defendant's house at 1559 River Street and recover the dungarees he was wearing (as mentioned during the confession) at the time of the alleged assault. The dungarees were in fact recovered under the warrant, as was a pair of undershorts found during the search.

The defendant's mother and brother, with Sergeant Feeney present, visited him at his cell at the District 5 station around 3:45 P.M. According to Feeney's testimony (which differed from that of the relatives), the defendant then uttered an incriminatory remark.

The judge after voir dire held (1) there was not an arrest on Hyde Park Avenue; (2) the sneakers should not be suppressed. (3) the confession should be suppressed, (4) with like consequence for the dungarees and undershorts; and (5) the statement to the mother and brother should not be suppressed. The cross-applications for interlocutory appeal followed.

In reviewing the judge's order we apply the standard recently stated, "that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for that judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but, even so, that his conclusion as to waiver is entitled to substantial deference." *Commonwealth* v. *Doyle*, Mass. , n.6 (1970) [Mass. Adv. Sh. (1979) 168, 175 n.6]. Adhering to that

standard, we see no sufficient basis for interfering with the findings or conclusions of the judge below, except as to the statement to the mother and brother which, as matter of law, must be suppressed as the product of the original confession. We reverse that part of the order and affirm the rest.

1. *The arrest.* The defendant argues initially that he was arrested at 10:30 A.M. on Hyde Park Avenue, and that there was not probable cause for an arrest at that time. If the arrest was thus illegal, he maintains, it would infect the sequelae. The Commonwealth contends, and the judge found, that there was no arrest on Hyde Park Avenue, that an arrest did not take place until about 11:15 A.M., after the sneakers appeared on inspection to be bloodied and Quish had denied the fighting. The defendant does not challenge the judge's finding that there was sufficient cause for an arrest at that time.

The judge's conclusion that the defendant accompanied the officers voluntarily, and not under constraint, is well supported. It was put to the defendant that the police were engaged in a general inquiry and were seeking cooperation: the officers asked, did not demand, that the defendant come with them; the defendant opened the car door himself and entered the vehicle without compulsion;[2] the officers yielded to his convenience by promising to drive him to his destination if he lost time. Allowing for any implications arising from the police uniform itself, we think the case for the judge's inference of nonarrest is quite as strong as it was in such instances as *Commonwealth* v. *Cruz*, Mass. (1977) [Mass. Adv. Sh. (1977) 2395], and *Commonwealth* v. *Slaney*, 350 Mass. 400 (1966), where like conclusions were reached. The situation would have been clearer if the officers had told the defendant

[2]The defendant testified that Officer Russo "had his arm on my elbow, opened the door, put me in," but the judge accepted Officer Solari's testimony that the defendant opened the door and climbed into the car himself. Officer Solari also testified that there was no physical contact between the defendant and any of the officers.

that he was free to go on his way if he chose; but this punctilio cannot be insisted on here. See *Commonwealth* v. *Cruz*, *supra* at n.3 [Mass. Adv. Sh. (1977) at 2401 n.3].

The judge seemed to be appraising the defendant's own understanding of his situation (account being taken of the defendant's mental or psychological condition at the time),[3] but we need to add that, regardless of the defendant's inner reaction, there was no arrest for the present purpose if a reasonable person on the scene would not receive the impression that the defendant was being forcibly detained — unless, indeed, the officers had reason to understand that the defendant apprehended he was confronting force, and they then did nothing to disabuse his mind. See *United States* v. *Scheiblauer*, 472 F.2d 297, 301 (9th Cir. 1973); *Seals* v. *United States*, 325 F.2d 1006 (D.C. Cir. 1963). On this view, it also appears there was not an arrest. See *United States* v. *Chaffen*, 587 F.2d 920 (8th Cir. 1978); *United States* v. *Brunson*, 549 F.2d 348 (5th Cir.), cert. denied, 434 U.S. 842 (1977). We need not enter on a more refined subjective-objective analysis. See *State* v. *Kelly*, 376 A.2d 840 (Me. 1977); Model Code of Pre-Arraignment Procedure, Commentary to § 110.1 (1975); Cook, Subjective Attitudes of Arrestee and Arrestor as Affecting Occurrence of Arrest, 19 U. Kan. L. Rev. 173 (1971).

2. *The sneakers*. The judge ruled against suppression of the sneakers on the ground that the defendant surrendered them voluntarily to the officer. In a camera's eye, that is what happened. But the defense disputes a conclusion of consent. It presses a Fourth Amendment contention that, even if not in custody, the defendant was now in a coercive setting, with a tendentious question raised and unresolved — whether the

[3]There is no inconsistency between the judge's finding of voluntariness here and his finding, discussed below, that the defendant's condition of mind was one factor which, together with others arising later, rendered his confession involuntary.

stains were not in fact blood. See *Commonwealth* v. *Harmond*, Mass. , (1978) [Mass. Adv. Sh. (1978) 2773, 2779]. The defendant was not informed that he could withhold the sneakers. See *id.*; *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 248-249 (1973). Again there is the element of the defendant's mental condition at the time.

The judge's finding of voluntariness is supported, and his ruling should not be disturbed. However, another basis for the ruling is at hand. On a conventional interpretation, the articles were in "plain view," and so could have been taken in any event. For the officer, lawfully questioning the defendant, had a "legitimate reason for being present" (*Coolidge* v. *New Hampshire*, 403 U.S. 443, 466 (1971); the evidence, an article appearing to be bloodstained, was "come by 'inadvertently'" or "without particular design" (*Commonwealth* v. *Bond*, Mass. , [1978]) [Mass. Adv. Sh. (1978) 1241, 1246]; and the officer could recognize it, in combination with the statements received, "to be plausibly related as proof to criminal activity of which [he was] already aware." *Id.* at [Mass. Adv. Sh. (1978) at 1247]. See *Commonwealth* v. *Moynihan*, Mass. (1978) [Mass. Adv. Sh. (1978) 2654]; *Harris* v. *United States*, 390 U.S. 234 (1968). This interpretation is in accord with decisions applying the plain view rule to the seizure without warrant of clothing or other material believed to be bloodstained and thus connected with a crime under investigation. See, e.g., *Commonwealth* v. *Perez*, 357 Mass. 290 (1970); *Smith* v. *Slayton*, 484 F.2d 1188 (4th Cir. 1973), cert. denied, 415 U.S. 924 (1974); *United States* v. *Sheard*, 473 F.2d 139 (D.C. Cir. 1972), cert. denied, 412 U.S. 943 (1973); *State* v. *Hardin*, 518 P.2d 151 (Nev. 1974); *State* v. *Rudd*, 49 N.J. 310 (1967). The case of *McCorquodale* v. *State*, 233 Ga. 369, 375 (1974), cert. denied, 428 U.S. 910 (1976), parallels our facts very closely. Professor LaFave might dispute whether, in strictness, the articles here, having not been come by in the course of a lawful search, were within

the sense of the "plain view" doctrine (W.R. LaFave, Search and Seizure § 2.2 at 240-248 [1978]), but the whole going situation was one where a requirement of procuring a warrant for the sneakers would seem extravagant. Cf. *Cupp* v. *Murphy*, 412 U.S. 291 (1973).

3. *The confession*. (a) *Content*. Sergeant Kelley started his interrogation by stating that the victim was dead and the defendant was under arrest. The defendant: "I am under arrest?" (And later: "Under arrest for what?") Kelley recited the Miranda warnings, asking the defendant to acknowledge each sentence as it was recited, which the defendant did by saying "yes" or "right." Then followed questions whether the defendant knew the victim. The defendant went as far as to say that he had spoken with her the previous Tuesday, but had not gone out with her.

Sergeant Kelley changed the subject to the sneakers and said they had been tested positively for blood. When the defendant tried again to account for this by referring to a fight with Quish on Tuesday, Kelley said the blood stains were fresh, made within hours, and scouted the defendant's attempted (and weak) explanations of how the stains could appear so although made on Tuesday.

Sergeant Kelley returned to the question of the defendant's acquaintance with the victim, and now said that they had been seen together on the church steps last night by two witnesses (not named): both witnesses, he said, were sure of the identification, reliable, and had known the defendant for several years. Kelley said it was not incumbent on him to show these witnesses to the defendant, but the defendant could confirm with Feeney and Madden that they had talked to the witnesses. (Kelley referred to the two witnesses at least seven times and later added, "we are not holding you here on a little thread of evidence. We have a good case here.") The defendant proceeded to admit he and the victim were together on the church stairs about midnight, but he said they had

parted shortly afterwards. He added that he had been "high" and "whacked out" on "downers" — fifteen Valium pills (on top of a "few 6-packs").

At this point, the interrogation seems to pause and take a turn with Madden reporting a question supposed to have been raised by the defendant: If he, the defendant, told them that he did it, "what bearing would that have on the case and what degree it would be?" Kelley went forward on two lines. On the "bearing" of a confession, he spoke at some length. He indicated a number of times that he could make no promises and would only be in a position to make it known to the court and the attorneys that the defendant had cooperated and finally told the truth, and "the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way." But he went on to say: "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would." "As I said before, if there is anything more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case." The second line Kelley took was to indicate there were extenuating factors: he laid stress on the fact of the defendant's drunken condition and, immediately after speaking of the "good defense," elicited from the defendant a "yes" answer to a leading question about the victim's "provoking" the defendant. The defendant first expressed doubt ("I don't know"), then answered questions, many of them leading, to the effect that he and the victim had gone to the Oak Street location where the victim had refused to have intercourse with him because (as she said) he was too young; that in his drunken state he had lost control and kicked her and found a stone nearby and threw it upon her; but he did have intercourse with her, whether before or after the beating, he could not remember. Finding her unconscious, he fled. After most of the story had been elicited, the defendant asked, "Does that

mean I am railroaded in now, then to be convicted and everything now?" Sergeant Kelley: "No."

(b) *Analysis.* The judge did not base himself on a single factor, but rather on the cumulative effect of several,[4] in finding the confession "involuntary," or — to speak more accurately — in finding that the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966). The factors were: communication of incorrect information about the strength of the Commonwealth's case; assurance that the defense would benefit from a confession; defendant's unstable condition combined with his youth and inexperience; failure to inform the defendant he could telephone his family or friends.

(i) It was true that one witness, John Carroll, gave a statement that he saw the defendant and the victim sitting on the church steps on the fatal night and that he had known and recognized them both. There was, however, no second witness who gave a like statement. Officer Kelley had in fact interviewed both Carroll and Joseph Ventola and had heard Ventola say that he did not recognize the male sitting on the steps. Ventola's description of the male actually contradicted Carroll's statement in the matter of whether the male was wear-

[4] Referring to the factors of defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the judge doubted seriously the effectiveness of the waiver of Miranda rights, but in his apparent view (which we share) the decision is better rested on those and other factors which in combination rendered the confession involuntary. (As the judge noted, there is a place in the tape of the interrogation which may be open to the interpretation that, at a point before the most serious admissions, Sergeant Kelley went on to question the defendant although the defendant had indicated that that was all he wanted ["liked"] to say. See *Miranda* v. *Arizona*, 384 U.S. 436, 474 [1966]; *Commonwealth* v. *Mitchell*, 246 Pa. Super. Ct. 132, 136 n.3 [1977]. The interpretation is dubious and again we pass to the better foundation of decision.)

ing a shirt. Officer Kelley's statements, repeatedly bracketing two witnesses as having known the defendant for years and as giving direct, mutually reinforcing identifications, were deceptive. The more general remarks about the strength of the Commonwealth's "case" served still further to give the impression that the case against the defendant was already proved. Taken alone, the misinformation would not, we think, suffice to show "involuntariness" (see *Frazier* v. *Cupp*, 394 U.S. 731 [1969]; *United States ex rel. Hall* v. *Director, Dep't of Corrections of Ill.*, 578 F.2d 194 [7th Cir. 1978]), but the judge could view it as a relevant factor in considering whether the defendant's ability to make a free choice was undermined. See *Commonwealth* v. *Jackson*, Mass. , & n.8 (1979) [Mass. Adv. Sh. (1979) 401, 413 & n.8]; *United States ex rel. Everett* v. *Murphy*, 329 F.2d 68 (2d Cir.), cert. denied, 377 U.S. 967 (1964); *United States ex rel. Caminito* v. *Murphy*, 222 F.2d 698 (2d Cir. 1955); *Robinson* v. *Smith*, 451 F. Supp. 1278 (W.D.N.Y. 1978); Model Code of Pre-Arraignment Procedure, Commentary to § 140.4 (1975).

(ii) The judge could find that the police overstepped the permissible line in advising the defendant about the consequences a confession might have for the conduct of the defense.

An officer may suggest broadly that it would be "better" for a suspect to tell the truth,[5] may indicate that the person's cooperation would be brought to the attention of the public officials or others involved,[6] or may state in general terms that co-

[5] See *United States* v. *Barfield*, 507 F.2d 53 (5th Cir.), cert. denied, 421 U.S. 950 (1975); *State* v. *McLallen*, 522 S.W.2d 1 (Mo. 1975); *Bell* v. *State*, 258 Ark. 976 (1975); *Robinson* v. *State*, 229 Ga. 14 (1972); *Coursey* v. *State*, 457 S.W.2d 585 (Tex. Crim. App. 1970).

[6] See *United States* v. *Curtis*, 562 F.2d 1153, 1154 (9th Cir. 1977), cert. denied, 99 S. Ct. 279 (1978); *United States* v. *Frazier*, 434 F.2d 994 (5th Cir. 1970); *Fernandez-Delgado* v. *United States*, 368 F.2d 34 (9th Cir. 1966); *Burton* v. *Cox*, 312 F. Supp. 264 (W.D. Va. 1970); *People* v. *Hubbard*, 55 Ill. 2d 142 (1973).

operation has been considered favorably by the courts in the past.[7] What is prohibited, if a confession is to stand, is an assurance, express or implied, that it will aid the defense or result in a lesser sentence.[8]

Here the officer did emphasize that he could make no promises. But having said that, and uttered in addition the generalities about cooperation, he assured the defendant that a confession would "probably help your defense; in fact, I am sure it would." The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be exonerated. Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's "provocation" and by the defendant's inebriated condition at the time.

The law invoked here goes back many years. "No cases require more careful scrutiny," said this court in *Commonwealth* v. *Curtis*, 97 Mass. 574, 578 (1867), "than those of disclosures made by a party under arrest to the officer who has him in custody, and in none will slighter threats or promises of favor exclude the subsequent confessions." In that case the court excluded a confession given after an assurance by a police officer that "as a general thing it was better for a man who was guilty to plead guilty, for he got a lighter sentence." For other expressions of the policy, see *Commonwealth* v. *Smith*, 119 Mass. 305 (1876); *Commonwealth* v. *Taylor*, 5 Cush. 605

[7] See *United States* v. *Reynolds*, 532 F.2d 1150 (7th Cir. 1976); *United States* v. *Glasgow*, 451 F.2d 557 (9th Cir. 1971); *Wallace* v. *State*, 290 Ala. 201 (1973).

[8] See *Bram* v. *United States*, 168 U.S. 532 (1897); *Grades* v. *Boles*, 398 F.2d 409 (4th Cir. 1968); *State* v. *Setzer*, 20 Wash. App. 48 (1978); *Bradley* v. *State*, 356 So.2d 849 (Fla. Dist. Ct. App. 1978); *State* v. *William*, 33 N.C. App. 624 (1977); *State* v. *Tardiff*, 374 A.2d 598 (Me. 1977); *Robinson* v. *State*, 229 Ga. 14 (1972); *Wallace* v. *State*, 290 Ala. 201 (1973); *State* v. *Castonguay*, 240 A.2d 747 (Me. 1968); *Lyter* v. *State*, 2 Md. App. 654 (1968); *State* v. *Fuqua*, 269 N.C. 223 (1967).

(1850); *Malloy* v. *Hogan*, 378 U.S. 1, 7 (1964); and for cases on either side of the line, compare *Bram* v. *United States*, 168 U.S. 532 (1897), and *State* v. *Pruitt*, 286 N.C. 442, 458 (1975), with *United States* v. *Williams*, 479 F.2d 1138 (4th Cir.), cert. denied, 414 U.S. 1025 (1973), and *United States* v. *Springer*, 460 F.2d 1344 (7th Cir.), cert. denied, 409 U.S. 873 (1972).

(iii) In the defendant's confession and affidavit on the motion to suppress, and his testimony and the testimony of others on voir dire, there was basis for questions to a medical expert called by the defense which led to the following opinion. If a person ingested ninety-five milligrams of Valium between 7:30 and 9 P.M. and between 7:30 and 11:30 P.M. drank twelve twelve-ounce bottles of beer,[9] there would be an impairment of memory, judgment, and intellectual function for at least six hours. At 11:30 the next morning, a wearing-off of the effects of the drug might be expected, "how much can't be said with certainty." If, in addition, twenty-five milligrams were taken at 10:20 A.M. that morning,[10] there would be at 11:20 A.M. "Some drowsiness, sedation, impairment of judgment and intellectual function." The same expert conceded that if a person took Valium once a week over a two-year period, some "tolerance would develop," but there was in fact no testimony that the defendant had been so regular a user. Expert testimony on the part of the Commonwealth was less suggestive of difficulties that the defendant might experience in

[9] In his affidavit the defendant stated that he took twenty five-milligram tablets of Valium at about 9 P.M. on June 10, drank about twelve containers of beer between 6 and 11 P.M. that evening, and about 8:30 A.M. on the following morning ingested an additional three or four Valium tablets. During the voir dire he added that he had smoked an unspecified quantity of marihuana on the evening of June 10.

[10] In fact the defendant said that he ingested Valium at about 8:30 A.M.; but the testimony as to the duration of the effects of the drug indicated that the one hour and fifty-minutes disparity would not make a material difference.

the morning. The defendant testified that he was dazed and confused and unable to remember much of the questioning by the police. Reading and listening to the tape of the Kelley interrogation, one finds strings of questions answered with monosyllables ("not reassuring explanations of his asserted comprehension," *Commonwealth* v. *Daniels*, 366 Mass. 601, 608 [1975]); confusion, too, in the defendant's questions about whether he was under arrest and whether he was to be "railroaded." Other answers were more forthcoming and involved some reasoning. The judge concluded that the defendant's judgment at that time was "dim" and "impaired." If it should be assumed that this condition would not alone justify suppression of the admissions (compare *Commonwealth* v. *White*, Mass. [1977] [Mass. Adv. Sh. (1977) 2805], aff'd by an equally divided court, U.S. [1978] [47 U.S.L.W. 4066 (Dec. 11, 1978)], with *Commonwealth* v. *Doyle*, Mass. [1979] [Mass. Adv. Sh. (1979) 168]), it would still be entitled to count in the judge's total assessment. See *Commonwealth* v. *Johnston*, Mass. (1977) [Mass. Adv. Sh. (1977) 1473]; *United States* v. *Grant*, 427 F. Supp. 45, 50 (S.D.N.Y. 1976).[11] So also the judge could give weight to the defendant's youth, inexperience, and limited schooling. See *Commonwealth* v. *Cain*, 361 Mass. 224, 228-229 (1972).

(iv) Especially in light of the defendant's youth, inexperience, and condition, a violation of G.L. c. 276, § 33A, as amended through St. 1963, c. 212, assumes importance. A person under arrest at a station with a telephone is entitled to be informed "forthwith upon his arrival . . . of his right to so use the telephone [i.e., to communicate with his family or friends], and such use shall be permitted within one hour thereafter." It has been held that unfavorable evidence, obtained as the result of an intentional deprival of the statutory

[11] See note 4 *supra*.

right, should be considered inadmissible and subject to suppression. *Commonwealth* v. *Jones*, 362 Mass. 497 (1972). We have not yet ordered suppression in a case where, although deprivation has occurred, it was not through proved intention; but we have lately again given warning of the importance of the statutory duty. See *Commonwealth* v. *Alicea*, Mass. , n.11 (1978) [Mass. Adv. Sh. (1978) 2707, 2711 n.11]. We agree with the judge that the failure affirmatively to comply with the statute is a factor in deciding whether a confession, vulnerable on other grounds, should be suppressed. Incidentally, it is clear, as will be seen below, that had the defendant called his mother or brother, they would have advised him not to speak to the police.

To conclude: The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assit his defense. We should not interfere with the judge's conclusion that the confession was involuntary and inadmissible.

4. *The dungarees.* When Officer Solari presented his application for the search warrant, the police were in possession of evidence probably sufficient, apart from the confession, to justify the issuance. The application, however, omitted mention of the crucial parts of this evidence, and the Commonwealth proceeds here on the assumption that the warrant rests on the confession. So the question is raised whether the warrant can legalize the seizure of the dungarees, when it is held that the confession must be suppressed. We agree that the answer is no, and this is explained simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment. See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 892-893 (7th Cir. 1976); *United States* v. *Mas-*

sey, 437 F. Supp. 843, 861-862 (M.D. Fla. 1977). Cf. *United States* v. *Castellana*, 488 F.2d 65 (5th Cir. 1974); *United States* v. *Cassell*, 452 F.2d 533, 541 (7th Cir. 1971). The conclusion follows from our recent decision of *Commonwealth* v. *White*, *supra* at - [Mass. Adv. Sh. (1977) at 2812-2813], where we suggested that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized. See Model Code of Pre-Arraignment Procedure, Commentary to § 150.4 (1975).

There are cases in the Supreme Court suggesting that in certain circumstances evidence, secured as a result of a confession elicited by a violation of the prophylactic Miranda rule, need not be excluded on any constitutional ground. See *Michigan* v. *Tucker*, 417 U.S. 433 (1974). Cf. *Oregon* v. *Haas*, 420 U.S. 714 (1975); *Harris* v. *New York*, 401 U.S. 222 (1971) (the latter case was followed in *Commonwealth* v. *Harris*, 364 Mass. 236 [1973]). Those cases do not, however, reach the present, where the confession was involuntary. This distinction has been noted by the Court.[12] We add that our position here is

[12] In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), where the Court held that testimonial evidence need not be excluded because it was obtained as a result of a confession elicited in violation of Miranda, the confession "could hardly be termed involuntary." Thus "the police conduct . . . did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*." *Id.* at 444-445. See also *Oregon* v. *Haas*, 420 U.S. 714, 722 (1975); *Harris* v. *New York*, 401 U.S. 222, 224 (1971). After *Michigan* v. *Tucker*, some courts have expressed doubt as to whether physical evidence gathered as a result of a confession which is voluntary but obtained in violation of Miranda requirements must always be excluded as its "fruits." See *United States ex rel. Hudson* v. *Cannon*, 529 F.2d 890, 894 n.3 (7th Cir. 1976); *Rhodes* v. *State*, 91 Nev. 17, 23 (1975). But see *Commonwealth* v. *Caso*, Mass. (1979) (Mass. Adv. Sh. [1979] 298); *United States* v. *Ceccolini*, 435 U.S. 268 (1978) (suggesting that

consistent with both the majority and minority views expressed in *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied. 425 U.S. 959 (1976).

5. *The afternoon statement.* News of the defendant's trouble did not reach his mother or brother until mid-afternoon. About 3:45 P.M. they arrived at the police station and were informed that the defendant had already confessed the crime. Sergeant Feeney and at least one other officer escorted the pair to the defendant's cell. Feeney testified that, as his visitors appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, ma." The mother and brother said loudly the defendant should say nothing to the police. The encounter was extremely emotional; the three were shouting at different points in the conversation.

In contending that any incriminating statement was consequent upon the involuntary confession and therefore similarly inadmissible, the defendant relied on the "cat out of the bag" analysis, which requires "the exclusion of a statement if, in giving the statement, the defendant was motivated by a belief that, after a prior coerced statement, his effort to withhold further information would be futile and he had nothing to lose by repetition or amplification of the earlier statements." *Commonwealth* v. *Mahnke*, *supra* at 686. See *Commonwealth* v. *Watkins*, Mass. , - (1978) [Mass. Adv. Sh. (1978) 1646, 1656-1661]; *United States* v. *Bayer*, 331 U.S. 532, 540 (1947). The judge below pointed to the following circumstances to show that the conditions of the statement were different from those of the confession and the two were thus independent: the statement was not prompted by police interrogation or made to the police (although police officers were with-

derivative physical evidence will less readily be admitted than derivative testimonial evidence).

in hearing), but was rather made to the family, and it appeared spontaneous.

Here we are obliged to hold that the judge committed error. His conclusion is not supported, and a contrary conclusion plainly is. The error actually derives from a misperception of the law.

It has been suggested that "there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time." *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) (Friendly, J.). See *Brown* v. *Illinois*, 422 U.S. 590, 605 & n.12 (1975); *Darwin* v. *Connecticut*, 391 U.S. 346, 350-351 (1968) (Harlan, J., concurring in part and dissenting in part). The factors relied on by the judge were not themselves strong enough to provide "insulation," and in all events they were quite overcome by other circumstances. The statement was made a relatively short time after the confession, and at the same place; it was corroborative of the confession; there was no opportunity for consultation with family; although, as we have noted, there had been a statement that the confession would help the defendant or even free him in the end, we cannot say he had such confidence as would mark a "break in time or the stream of events" (see *Commonwealth* v. *Haas*, Mass. , [1977] [Mass. Adv. Sh. (1977) 2212, 2223]) sufficient to dissociate the statement from the confession. Cf. *Commonwealth* v. *Mahnke*, *supra*, 368 Mass. at 667. Nor do we think it may be assumed that remorse was so far at work as to provide the "break." See *id.* at 688 & n.31; *Copeland* v. *United States*, 343 F.2d 287, 291 & n.3 (D.C. Cir. 1964). Finally, the confession was rendered involuntary by police misconduct which cannot be termed inadvertent. Cf. *Knott* v. *Howard*, 378 F. Supp. 1325 (D.R.I. 1974), aff'd, 511 F.2d 1060 (1st Cir. 1975). The burden was on the Commonwealth to show circumstances insulating the statement from the confession, see *Brown* v. *Illinois*, *supra* at 604, and in this we think it must fail.

Our conclusion is in accord with other decisions requiring the suppression of an inculpatory statement which followed an inadmissible confession and which was not made in the course of police interrogation. See *Ricks* v. *United States*, 334 F.2d 964 (D.C. Cir. 1964); *State* v. *Paz*, 31 Ore. App. 851 (1977). Cf. *Copeland* v. *United States*, *supra* at 292 (Bazelon, C.J., concurring in part and dissenting in part); *Commonwealth* v. *Bordner*, 432 Pa. 405 (1968); *Soolook* v. *State*, 447 P.2d 55 (Alas. 1968), cert. denied, 396 U.S. 850 (1969).

6. *Conclusion*. The order of the Superior Court is reversed in so far as it denied the defendant's motion to suppress the alleged mid-afternoon inculpatory statement; in all other respects it is affirmed. The case is remanded to the Superior Court for further proceedings consistent with this opinion.

So ordered.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

JOSEPH D. MEEHAN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF MASSACHUSETTS

Brief For Respondent In Opposition

AFFIDAVIT OF JOSEPH D. MEEHAN

Joseph D. Meehan, being duly sworn, deposes and says:

1. I am a citizen of the United States and the respondent in the above-entitled action.

2. I desire to oppose the petition for a writ of certiorari to the Supreme Judicial Court of Massachusetts to contend that the Supreme Judicial Court of Massachusetts did not err in its judgment of March 19, 1979, pursuant to Rule 24

of the Rules of this Court, but because of my poverty I am unable to pay the costs of such opposition or to give security therefor and still be able to provide myself with the necessities of life.

3. I believe that the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts should not be granted.

4. I believe that I am entitled to oppose the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts.

The nature of the question to be presented upon such opposition is as follows:

> There is no federal question of substance presented to this Court that has not been determined by this Court or that has not been decided in a way not in accord with the applicable decisions of this Court. There are no special or important reasons to review the decision of the Supreme Judicial Court of Massachusetts.

I contend that the Supreme Judicial Court of Massachusetts did not err in holding that the defendant's confession was involuntary and inadmissible, that the suppressed confession cannot justify the issuance of a search warrant and that the defendant's afternoon statement must be suppressed.

WHEREFORE, affiant prays that he may have leave to proceed in this Court in forma pauperis.

Joseph D. Meehan

Joseph D. Meehan

Commonwealth of Massachusetts
Suffolk, ss.
August 3 , 1979

Then personally appeared the above Joseph Meehan who made oath to the truth of the foregoing statements.

Before me,

Notary Public

My Commission Expires:
October 16, 1981

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1978

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
Petitioner

v.

JOSEPH D. MEEHAN,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF MASSACHUSETTS

Brief For Respondent In Opposition

Motion For Leave To Proceed In Forma Pauperis

Respondent moves the Court for an order permitting him to proceed in this Court, in forma pauperis with his brief in opposition to the petition for writ of certiorari to the Supreme Judicial Court of Massachusetts to contend that the Supreme Judicial Court of Massachusetts did not err in its decision of March 19, 1979, pursuant to the provisionsof Title 28, United States Code, Section 1915, and Rule 53 of the Rules of this Court, and in support thereof attaches the affidavit of said respondent.

Respondent's brief in opposition is being filed with the motion and with respondent's affidavit.

David A. Mills
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
Petitioner,

v.

JOSEPH MEEHAN,
Respondent.

On Petition For A Writ of Certiorari to the Supreme Judicial Court of the Commonwealth of Massachusetts.

Brief For The Respondent In Opposition

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1978

NO. 78-1874

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,

V.

JOSEPH MEEHAN,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
SUPREME JUDICIAL COURT OF THE
COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

The respondent is not dissatisfied with the petitioner's statement of jurisdiction and citation to opinion below.

Questions Presented

I. Whether this Court ought to grant certiorari to review the factual finding of a trial court.

II. Whether this Court ought to grant certiorari to review a case that presents an issue decided in accordance with the holding in a case that was recently affirmed by this Court.

III. Whether this Court ought to grant certiorari to review a case that presents no novel questions of law or that presents no issues that may be construed as having been decided in a way that is not in accord with the appropriate decisions of this Court.

Statement Of The Case

The facts of this case are set forth in the opinion of the Supreme Judicial Court, Commonwealth v. Meehan, 1979 Mass. Adv. Sh. 710 at 711-729. The facts are also set forth in a "Memorandum of Decision" of the trial judge who heard the evidence. These decisions are reprinted in the Appendix to the Petition at 3a-40a.

The questions raised in this Court were raised by means of a motion to suppress, and the trial court's findings of fact and rulings on the motion to suppress are contained in the memorandum that is reprinted in the Appendix to the Petition at 23a-40a. That court inquired whether the defendant's statement to the police was voluntary and whether there was any violation of the Miranda rule. The court stated:

> In dealing with these questions, I have considered the affidavit of Meehan as to the amount of Valium tablets he consumed during the evening of June 10 and on the early morning of June 11, 1976 (a total of 24 tablets), and he had consumed twelve cans of beer during the late evening of June 10th; I have considered, as well, the medical opinions of Dr. Sovner and Dr. Greenblatt as to the observable effects of the taking of such pills and beer; such would leave a person with slurred speech, unsteady gait, drowsy and sleepy, and the memory and judgment of such person would be impaired. There was a difference of medical opinion as to when the peak effects of the Valium consumption would be reached and a discussion of the build-up tolerance in a constant drug user; the manner in which the Miranda warnings, so-called, were given to the defendant Meehan and his

> responses thereto; the age, educational background and state of maturity of the defendant; and finally the nature and content of the entire transcript of the "questioning" of Meehan by Sergeant Keely, as contained in Exhibit 14, Pages 29 to 48, inclusive.

Appendix to Petition, 31a.

Based on his evaluation of the evidence presented to him first hand, the trial judge concluded:

> That the entire statement taken by Sergeant Kelly of the defendant Meehan is so infected with this overpowering broadside upon the defendant in very skillful police trained language that the statement by Meehan, in its entirety, should be stricken on the grounds that it was neither voluntary nor was it carried on with the principles of the Miranda case in mind. Therefore, the Motion to Suppress this statement is allowed in its entirety.

Appendix to Petition, 37a.

The Massachusetts Supreme Judicial Court reviewed the details leading to this factual finding. That Court acknowledged that many factors may be considered while determining the voluntariness of the statement, and it concluded that it shouldn't interfere with the judge's conclusion. Appendix to Petition, 17a-18a.

The Supreme Judicial Court also held that the search warrant, which relied solely on the involuntary confession to justify its issuance, could not legalize the seizure of the defendant's dungarees. That Court also held that the defendant's subsequent, in-custody statement to his mother was consequent upon the involuntary confession and therefore inadmissible. Appendix to Petition, 18a-21a.

Reasons For Denying The Writ

I. THIS COURT SHOULD NOT REVIEW THE FACTUAL FINDING OF THE INVOLUNTARINESS OF THE DEFENDANT'S CONFESSION.

The defendant submits that this Court should not review the voluntariness of the confession because the Commonwealth has raised only a question of fact that has been decided below. Where the only relevant issues that are raised on a writ of certiorari are factual issues, the writ should be dismissed. Tacon v. Arizona, 410 U.S. 351 (1973). This Court stated in United States v. Johnston, 268 U.S. 220, 227 (1925) that "We do not grant certiorari to review evidence and discuss specific facts."

A Justice of the Superior Court (the trial court) found that the defendant's statement was not voluntary. He determined, because the defendant's statement was "so infected with" the "overpowering broadside upon the defendant" by the police interrogating in very skillful police trained language, that the statement to the police "was neither voluntary nor was it carried out with the principles of the Miranda case in mind." Appendix to Petition, 37a. The Supreme Judicial Court decided that the trial court judge's conclusion that the confession was involuntary and inadmissible should not be interfered with. Appendix to Petition, 18a.

The Commonwealth acknowledges that the lower court must examine the "totality of the circumstances" to determine whether the confession was given voluntarily. The trial court below found that under all the factors, which included the defendant's age, his educational background, his maturity and his consumption of a quantity of Valium and beer, the defendant was overpowered by the skilled questioning of a trained police officer. To this factual finding the Court below merely applied the standard of law that involuntary statements that are procured contrary to the principles of Miranda should be suppressed.

It appears that the Commonwealth contests the factual finding by the trial court of the statement's involuntariness. The Commonwealth claims that because each separate factor is not in itself coercive, a court could not find that the statement was involuntary. The petitioner suggests that this is an improper standard.

In Fikes v. Alabama, 352 U.S. 191, 197 (1957), this Court adopted the phrase, "totality of the circumstances" in deciding the voluntariness of a confession specifically to underscore that the question of voluntariness may not always be answered by only considering overt evidence of coercion such as evidence of physical brutality. There this Court found involuntariness by weighing the pressure applied to the defendant against his power of resistance. To require a court to limit its examination of the "totality of the circumstances" to factors that are in themselves coercive would strip the phrase of all meaning. A trial court must examine each item of evidence for the precise reason of determining if the entire situation is coercive.

II. THIS COURT RECENTLY AFFIRMING A DECISION, MASSACHUSETTS V. WHITE, [439 U.S. 280 (1978) AFFIRMED BY AN EQUALLY DIVIDED COURT, COMMONWEALTH V. WHITE, 1977 MASS. ADV. SH. 2805, 371 N.E. 2d 777] THAT HOLDS THAT AN INVOLUNTARY STATEMENT MAY NOT BE USED TO ESTABLISH PROBABLE CAUSE FOR A SEARCH WARRANT, AND THEREFORE, THE ISSUE HAS BEEN DECIDED.

A search warrant relying solely on a statement taken in violation of the Fifth Amendment must be invalidated. In Commonwealth v. White, 1977 Mass. Adv. Sh. at 2812, 371 N.E. 2d at 781, the Supreme Judicial Court of Massachusetts decided whether statements procured in violation of the commands of Miranda, "despite their inadmissibility at trial, could be used for the purpose of establishing probable cause sufficient to obtain a valid search warrant." The Massachusetts court concluded, and this Court affirmed the conclusion, that the

statements may not be used for that purpose. Id. at 2812, 371 N.E. 2d at 781; and Massachusetts v. White.

In that case the trial judge concluded that the defendant, in his intoxicated condition, had not knowingly and intelligently waived his right to counsel or his privilege against self-incrimination. The Massachusetts court explained why the search warrant had to be invalidated:

> To hold otherwise would, in effect, sanction the initial violations of constitutional guarantees which the judge found took place in the police barracks. The need to prevent such violations from escaping review underlies the so called 'fruit of the poisonous tree' doctrine set forth in Silverthorne Lumber Co. v. United States, 251 U.S. 385, 40 S.Ct. 182, 64 L.Ed. 319 (1920); and Nardone v. United States, 308 U.S. 338, 60 S. Ct. 266, 84 L.Ed. 307 (1939).
>
> 1977 Mass. Adv. Sh. at 2812, 371 N.E. 2d at 781.

The facts in the instant case are substantially indistinguishable. The defendant's involuntary statement was the only evidence offered to obtain a search warrant. Therefore, following Massachusetts v. White, supra, the search warrant was invalid.

The respondent acknowledges that the judgment offered by an equally divided Court is not "entitled to precedential weight..." Neil v. Biggers, 409 U.S. 188, 192 (1972). The respondent merely submits that the fact that this Court has so recently reviewed this precise issue should be included in the consideration of this petition.

III. THE PETITIONER HAS NOT PRESENTED ANY NOVEL OR SUBSTANTIAL QUESTIONS OF LAW, NOR HAS THE COMMONWEALTH SHOWN THAT THE INSTANT CASE HAS BEEN DECIDED IN A WAY PROBABLY NOT IN ACCORD WITH APPLICABLE DECISIONS OF THIS COURT.

A. Massachusetts v. White, although affirmed by an equally divided Court, has support both in case law and in policy.

1. This Court has applied the "fruits of the poisonous tree" doctrine in Fifth Amendment violations.

The "fruits of the poisonous tree" doctrine has often been applied to Fifth Amendment and Miranda v. Arizona, 384 U.S. 436 (1966) violations. In Harrison v. United States, 392 U.S. 219 (1969), this Court stated:

> Here ... the petitioner testified only after the government had illegally introduced into evidence three confessions, all wrongfully obtained, and the same principles that prohibit the use of confessions so procured also prohibits the use of any testimony impelled thereby - the fruit of the poisonous tree to invoke a time-worn metaphor. For the 'essence of a provision forbidding the acquisition of evidence in a certain way is that not merely evidence so acquired shall not be used before the court but that it shall not be used at all.' Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392.

392 U.S. at 222.

Moreover, in Parker v. Estelle, 498 F.2d 625 (5th Cir. 1974), cert. den. 421 U.S. 963 (1975) the Fifth Circuit holding was left unchallenged by this Court:

> There can be no doubt that the Silverthorne principle announced in a search and seizure context is applicable to a suppressed confession case, Harrison v. United States, 392 U.S. 219, 88 S.Ct. 2008, 20 L.Ed. 2d 1047 (1969); or that its exclusionary effect applies not only to tangible evidence but also to the testimony of witnesses.

498 F.2d at 629.

Where, as here, there is an actual violation of the Fifth Amendment and the principles of the Miranda case and not merely a technical violation of the Miranda requirements, the exclusionary doctrine should apply to the tainted fruits of testimonial evidence. See Parker v. Estelle, supra; United States v. Massey, 437 F. Supp. 843, 860 (M.D. Fla. 1977); Michigan v. Tucker, 417 U.S. 433 (1974); United States ex rel Hudson v. Cannon, 529 F.2d 890, 892-893 (7th Cir. 1976). The conclusion by the Supreme Judicial Court that the seizure of

the dungarees cannot be legalized by the search warrant relying on the involuntary confession is entirely consistent with this Court's decisions.

The government has the burden of showing that the evidence obtained is not the fruit of the poisonous tree. A lower court, in United States ex rel Sanders v. Rowe, 460 F. Supp. 1128 (N.D. Ill. E.D. 1978), stated:

> The fruits of the poisonous tree doctrine requiring the exclusion of tainted fruit of police conduct abridging constitutional rights derives from Wong Sun v. United States, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed. 2d 441 (1963); and Brown v. Illinois, 422 U.S. 590, 95 S.Ct. 2254, 45 L.Ed. 2d 416 (1975). Once a defendant makes a prima facie showing of unconstitutional conduct by the government in obtaining its evidence, the burden shifts to the government to demonstrate either that it did not in fact obtain any later evidence by exploiting the primary illegality or that any causal connections had become so attenuated that the taint was desicated ...

460 F. Supp. at 1137.

The respondent suggests that the language quoted is applicable to the instant case and consistent with the law of this Court.

2. The Search Warrant Was Not Purged Of The Taint Of The Primary Illegality.

Initial police misconduct must be at a sufficient remove from the ultimate acquisition of evidence for the evidence to be admissible. In Wong Sun v. United States, 371 U.S. 471 (1963), this Court explained that in applying this concept of "purging the taint of the primary illegality," the question is:

> Whether, granting establishment of the primary illegality, the evidence ... has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged of the primary taint.

371 U.S. at 487-488.

As Mr. Justice Powell explained in Brown v. Illinois, 422 U.S. 590, 609 (1975) (concurring opinion):

> The notion of the 'dissipation of the taint' attempts to mark the point at which the detrimental consequences of illegal police action becomes so attenuated that the deterrent effect of the exclusionary rule no longer justifies the cost.

In the instant case, the information from the involuntary statement was used as the basis for probable cause in a search warrant. The complete lack of any attenuation from the primary illegality shows that the lower court's decision was within the reasoning of this Court's decisions.

3. In The Instant Case, The Application Of The Exclusionary Rule Will Deter Future Police Misconduct.

This Court has limited the use of the exclusionary rule to areas where police misconduct will be deterred. United States v. Calandra, 414 U.S. 338 (1974). As recognized in Stone v. Powell, 428 U.S. 465 (1976), the exclusionary rule articulated in Mapp v. Ohio, 367 U.S. 643 (1961) is a pragmatic rule:

> The Mapp majority justified the application of the rule to the states on several different grounds [footnote omitted] but relied principally upon the belief that exclusion would deter future unlawful police conduct ....

428 U.S. at 484.

In the present case the deterrent effect of excluding the evidence would be great. If a search warrant could be based on involuntary confessions, the police would be encouraged to violate the defendant's Miranda and Fifth Amendment rights in order to locate physical evidence of the crime. After a defendant has been interrogated by all means known to the police and after he has given an involuntary statement under all that pressure, the police could use the

statement to get a search warrant to secure evidence for trial. The police must not be allowed to benefit from their violation of the defendant's Fifth Amendment rights by using this violation to secure a search warrant.

The holding in Spinelli v. United States, 393 U.S. 410 (1969) has no effect here. In that case hearsay evidence was held acceptable for determining probable cause in a search warrant. Excluding hearsay would not deter any police misconduct; therefore, no analogy may be made to the application of the exclusionary rule.

4. The Holding In Michigan v. Tucker, 417 U.S. 433 (1974) Does Not Control.

The Commonwealth contends that the statements taken in violation of Miranda need not be excluded from all proceedings. This Court has ruled that when evidence that has been acquired during the commission of a technical violation of the Miranda rule leads to testimony that is voluntarily given and is otherwise trustworthy, the testimony need not be excluded. Michigan v. Tucker, 417 U.S 433 (1974).

One of the factors that the Court evaluates in deciding whether to allow testimony of a witness who was discovered through an involuntary confession is the willingness of the witness to freely testify. United States v. Ceccolini, 435 U.S. 268, 277, 98 S.Ct. 1054, 1060 (1978). The witness may exercise free will and offer testimony of her own volition.

The respondent believes that the Court in Ceccolini realized that the question of free will is not the same in the case of physical evidence discovered

as a result of inadmissible evidence as it is in the case of live witness testimony discovered as a result of inadmissible evidence. The Court postured that "the degree of free will necessary to dissipate the taint will very likely be found more often in the case of live witness testimony than other kinds of evidence." 435 U.S. at 277, 98 S.Ct. at 1060. This is, in part, because the physical evidence itself has no free will. There is no doubt that the physical evidence will not come in and offer testimony of its own volition. This Court concluded that:

> [T]he exclusionary rule should be invoked with much greater reluctance where the claim is based on a causal relationship between a constitutional violation and a discovery of a live witness than when a similar claim is advanced to support the suppression of an inanimate object.

435 U.S. at 280.

It follows from the fact that the exclusionary rule is invoked with greater reluctance where inadmissible statements lead to live witness testimony than where inadmissible statements lead to physical evidence that Michigan v. Tucker, supra, cannot control.

B. The Defendant's Afternoon Statement Must Be Suppressed Because It Was Not Sufficiently Insulated From The Initial Illegality.

A statement elicited from a defendant that is a product of police misconduct must be suppressed. Clewis v. Texas, 386 U.S. 707 (1967); United States v. Bayer, 331 U.S. 532 (1947). The Court must look to several factors in determining a statement's admissibility. In Brown v. Illinois, 422 U.S. 590 (1975), where the initial misconduct was an illegal arrest, this Court said:

> No single fact is dispositive ... the temporal proximity of the arrest and confession, the presence of intervening circumstances, see Johnson v. Louisiana, 406 U.S. 356 (1972), and particularly the purpose and the flagrancy of the official misconduct are all relevant. See Wong Sun v. United States, 379 U.S. at 491. The voluntariness of the statement is the threshold question.

422 U.S. at 609.

This Court did not dispute the holding in United States v. Gorman, 355 F.2d 151 (2d Cir. 1965), cert. denied, 384 U.S. 1024 (1966) when the Second Circuit Court realized that:

> After a first confession has been extracted from a man previously professing his innocence by a means calculated to break his will, a second confession is more likely secured. In such a case there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time.

355 F.2d at 157.

The period of time elapsed was too short to provide sufficient insulation between the illegal act by the police and the afternoon statement by the defendant. Killough v. United States, 315 F.2d 241 (D.C. Cir. 1962). A two-hour lapse of time has been held to be insufficient time. Brown v. Illinois, supra; Randall v. Estelle, 492 F.2d 118 (5th Cir. 1974). Courts have considered this issue when there has been as much as a six-month delay between statements. United States v. Bayer, 331 U.S. 532 (1947); Goldsmith v. United States, 277 F.2d 335 (1960), cert. denied 364 U.S. 863 (1960). The lapse of only a few hours would not give the defendant enough time to be insulated from the factors of his late-morning

coerced confession and therefore the afternoon statement must be suppressed as a product of the police misconduct.

Where there was no change of circumstances that would insulate the defendant from the police misconduct, and where the conditions do not create a break in the stream of events, a subsequent confession will not be considered voluntary. Clewis v. Texas, supra; Knott v. Howard, 511 F.2d 1060 (1st Cir. 1975). Here, the defendant had not seen his attorney. He was still in custody in the police station. He spoke before he had a chance to confer with his family. There was no change of circumstances and thus no break in the stream of events before he made the afternoon statement; therefore, the statement cannot be distinguished from the late-morning confession.

The statement should be suppressed even though the police did not actually ask the defendant any question. Ricks v. United States, 334 F.2d 964 (D.C. Cir. 1964); Copeland v. United States, 343 F.2d 287 (D.C. Cir. 1965) (Bazelon, C.J., concurring in part and dissenting in part). In Ricks, the Court said, "The questioning which preceded Ricks' statements precludes any claim that they constituted 'spontaneous threshold confessions.'" 334 F.2d at 968. Moreover, the burden was on the government to show the circumstances insulating the statement from the confession. Brown v. Illinois, supra at 604.

Under the circumstances of the second statement, namely the short time between statements, the defendant's condition, the absence of any other change, the state has failed to prove that the defendant has been insulated from his initial confession to allow the second statement to be admitted.

Conclusion

Pursuant to Rule 19 of this Court, certiorari should only be granted for special and important reasons. The petition has only raised issues of fact, issues of law that have already been decided by this Court and issues of law that are entirely consistent with decisions of this Court. While the respondent recognizes that review on certiorari is a matter of sound judicial discretion, he submits that the instant case presents no issues appropriate for review.

Respectfully submitted,

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In the
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OCTOBER TERM, 1979.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

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Brief for the Petitioner.

Opinion Below.

The opinion of the Supreme Judicial Court is reported at _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527 (App. 62).

Jurisdiction.

The judgment of the court below was entered on March 19, 1979. The petition for writ of certiorari was filed on June 18, 1979, and was granted on October 1, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

Questions Presented.

I. Whether the court below applied proper constitutional standards in holding a confession to be involuntary under the Fifth Amendment in the absence of any evidence of actual coercion?

II. Whether real evidence obtained pursuant to a search warrant based on an inadmissible confession must be suppressed where the police had other legally obtained evidence to support the warrant?

III. Whether a spontaneous inculpatory statement by the defendant to his mother need be suppressed as a product of the initial illegally obtained statement?

Constitutional Provisions Involved.

Fourth Amendment.

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Fifth Amendment.

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Fourteenth Amendment.

Section 1. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law . . .."

Statement of the Case.

Prior Proceedings.

On August 11, 1976, the Suffolk County grand jury indicted Joseph Meehan for the murder of Mary Ann Birks (App. 11). Prior to trial, the defendant moved to suppress his inculpatory statements made while in custody and articles of his clothing (App. 12). After a pretrial hearing, the judge filed a memorandum of decision granting the motion in part and denying it in part, suppressing statements made to the police and a pair

of pants seized pursuant to a search warrant and allowing a statement made by the defendant to his mother (App. 59-60). The Commonwealth and the defendant then applied for leave to take interlocutory appeals pursuant to Mass. Gen. Laws, c. 278, § 28E. The applications were granted by a single justice of the Supreme Judicial Court (App. 61).

On appeal, the Supreme Judicial Court affirmed the order granting suppression but reversed the denial of the defendant's motion to suppress his statement to his mother. *Commonwealth* v. *Meehan*, _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 387 N.E. 2d 527 (App. 62).

Statement of Facts.

The body of the victim was found on the front lawn of a home in the Hyde Park section of Boston in the early morning hours of June 11, 1976 (Tr. 53-54). Her face and head were covered with blood (Tr. 84-85) and a large rock found nearby was also bloodied (Tr. 600).

Police officers immediately attempted to interview people who lived in the vicinity (Tr. 55) or were known to have been at Cleary Square, a nearby gathering place, on the previous night. Mary Crowley, a neighbor, told the police in a taped interview that she had been awakened at approximately 2 A.M. on that morning. She heard a woman scream, "Don't. Please don't," and then scream wordlessly. Mrs. Crowley's daughter, Claire Wilde, who was also staying at that address, corroborated Mrs. Crowley's account and added that she, Wilde, had looked out the window and had seen a white male walk by the house. Although she did not see his face, she described him as about five feet ten inches, dark-haired, slender, in his mid-twenties, and wearing faded jeans, with his shirt sleeves rolled up. The man returned a few minutes later and

Mrs. Wilde heard the sound of a large boulder being thrown on the lawn (*Memorandum of Decision*, App. 63).

Later in the morning the police interviewed, at the Hyde Park police station, four persons who had been in Cleary Square the previous evening. One of them, Joseph Ventola, who was acquainted with the victim, said that he had seen her around midnight on the steps of Christ Church at 1220 River Street. With her was a man whom Ventola described as being in his late teens, skinny, dark-haired and shirtless (*Memorandum of Decision*, App. 64). A second witness, John Carroll, said that he had seen the victim on the church steps and that she was with Joseph Meehan, whom he knew (Tr. 195, 206, 218).

During the course of Carroll's interview, he looked out the window of the first floor room in the police station and saw the defendant on Hyde Park Avenue (Tr. 205). He pointed him out to the police officers. Detective Solari passed through the open first floor window to the street and Officers Cannon and Russo went out the front door (Tr. 116, 120). Russo proceeded up the street on foot and Solari and Cannon came in a cruiser (Tr. 121). Officer Cannon told Meehan that they were investigating an assault and that they had been told that he was in the vicinity on the previous evening. They asked the defendant if he would accompany them to the station for an interview (Tr. 125). The defendant said he was willing to go, but expressed concern that he would be late for an appointment to file an appeal concerning unemployment benefits. The officers said that they would drive him, should he be delayed (Tr. 126-127). The defendant thereupon opened the cruiser door and sat down in the back (Tr. 141). The defendant was 18 years old, five feet six inches, and was wearing a print shirt with the sleeves rolled up and cut-off dungarees (Tr. 142). This encounter occurred at approximately 10:30 A.M. (Tr. 125).

The defendant was taken to the station where he was interviewed by Detective Solari. Solari noticed red stains on the defendant's sneakers (Tr. 143). When Solari asked him about them, the defendant explained that it was probably mud (Tr. 143). Solari suggested that it looked like blood (Tr. 144). The defendant then said that the stains were from a fight he had been in several days earlier with a George Quish (Tr. 129, 144). Solari asked to see the sneakers and the defendant gave Solari his left sneaker. Solari took the sneaker, left the room, and showed it to Sergeant Feeney, who agreed that the stains were bloodstains (Tr. 145). Quish, who was also being interviewed in the station at the same time, denied he had been in a fight with Joseph Meehan (Tr. 145, 607, 648). Feeney then told Solari to arrest the defendant and give him his *Miranda* warnings, which he did (Tr. 145-146).

Later that morning, at about 11:20 A.M., Sergeant Kelley commenced the interrogation of the defendant with Officers Feeney, Russo, and Madden present. Kelley told the defendant that the victim was dead and that he was under arrest. Kelley again gave the defendant his *Miranda* warnings, and the defendant acknowledged each part of the warnings (Tr. 90) by saying "yes" or "right" (Ex. 14, App. 22-42). The defendant admitted that he knew the victim and had spoken with her on the preceding Tuesday (Ex. 14, App. 24).

Kelley then informed the defendant that two witnesses had seen him on the steps of the church the previous evening and that both witnesses knew the defendant (Ex. 14, App. 27). Kelley referred to the witnesses several times in the course of his interrogation and told the defendant that they had a good case. The defendant admitted that he and the victim had been together on the church stairs the night before, but said they parted soon afterward (Ex. 14, App. 31). The defendant also said that he was high and had taken 15 Valium pills and had drunk a "few six-packs" of beer (Ex. 14, App. 33, 36).

The defendant then asked what effect on the case his confessing would have. Kelley told the defendant that if he confessed, he could make no promises, and could only let the court know that the defendant had cooperated. Kelley indicated that when a defendant told the truth, "the court looks upon [such] cases . . . a lot better than when we have to prove it the hard way" (Ex. 14, App. 34-35). He also added that he thought the truth would make a good defense in the defendant's case. Kelley then discussed extenuating factors with the defendant, i.e., his intoxication, and also asked if the victim had provoked him (Ex. 14, App. 36). Continuing his questioning, Kelley asked about the circumstances of the previous evening. The defendant answered questions which indicated that he and the victim had gone to 40 Oak Street together, that the victim had refused to have sexual intercourse with him, that he became enraged and kicked her in the face and head several times, knocking her unconscious, that he left, found a large rock and returned and threw it on the unconscious victim. After the confession, the defendant asked if he had been "railroaded" into a conviction and Kelley assured him no (Ex. 14, App. 22-42).

That afternoon, based on the confession and the statements of the witnesses, Claire Wilde and John Carroll, Officer Solari applied for a warrant to search the defendant's house for the dungarees he had been wearing. The dungarees and a pair of undershorts were recovered in the search (Tr. 618, 669; Exs. 4, 5, App. 17-21).

At approximately 3:30 P.M. that afternoon, after being informed of the defendant's situation, the defendant's mother and brother arrived at the police station (Tr. 614). They were told that the defendant had already confessed and were escorted to the defendant's cell. Officer Feeney testified that when the defendant saw them he began to cry and said, "Ma, I didn't mean to hit her so hard" (Tr. 615). The defendant

and his mother said that the defendant merely said, "I'm sorry, Ma" (Tr. 487). The mother and brother then advised the defendant to say nothing to the police (Tr. 487).

The police officers testified that at all times, from when the defendant was first spoken to on the street, he appeared steady on his feet, his eyes were clear, his speech was not slurred, and he responded to conversation and questions coherently (Tr. 150-151, 608-609, 660).

At the pretrial hearings, the defendant filed a motion to suppress his confession. Attached to the motion was the defendant's affidavit alleging that on June 10, 1976, at approximately 9 P.M., he ingested approximately twenty Valium tablets; that on June 11, 1976, at approximately 8:30 A.M., he ingested three or four additional Valium tablets; and that on June 10, 1976, between 6 P.M. and 11 P.M. he drank approximately twelve beers. He further alleged that he did not remember all the questions asked or the answers given during his interrogation (App. 13).

The defendant testified that during Thursday, June 10, 1976, he intermittently consumed various quantities of beer and marijuana (Tr. 563). He also testified that he purchased twenty Valium tablets, and swallowed a handful (Tr. 562-563). He further testified that the next morning he swallowed the rest of the Valium, about four tablets; that he had used heroin since the age of fourteen and had also used Valium in excessive quantities when heroin was not available (Tr. 561), and that he drank beer and smoked marijuana (Tr. 562). The defendant alleged that he did not remember kicking Miss Birks in the head five to ten times or telling the police that he had done so (Tr. 567).

Dr. Greenblatt, the defense's expert witness, testified that the observable effects of an excessive dose of Valium are to induce difficulty in walking, slurring of speech, and possible impairment of memory and judgment (Tr. 298). Dr. Greenblatt

also testified that by 11:30 A.M., twelve, thirteen, or fourteen hours after ingestion, the effects of Valium cannot be stated with certainty because they wear off (Tr. 310). He further testified that it is impossible to predict for any individual how profound the effects of Valium will be, and impossible to predict how much residual effect there would be from drugs ingested on a previous night (Tr. 313, 328, 332). On cross-examination, Dr. Greenblatt testified that tolerance of the drug develops after chronic and habitual use. He further testified that the effect of tolerance is to reduce the intensity and the duration of the effects of the drug upon the user (Tr. 320-321).

The Commonwealth's expert witness, Dr. Robert Sovner, agreed with Dr. Greenblatt both as to the effects of Valium and as to the development of tolerance to the effects after prolonged habitual use (Tr. 687-688). He added that Valium is primarily used in psychiatry to alleviate symptoms of anxiety (Tr. 689). He also testified that the peak effects of the largest doses of Valium are reached within two hours after ingestion (Tr. 689). After listening to the tape of the defendant's confession, Dr. Sovner concluded that the defendant was, at the time of his statement, alert, oriented and self-possessed (Tr. 696-697).

The defendant's mother testified that he (the defendant) had graduated from the ninth grade and had attended two years of high school before he was expelled (Tr. 476).

Summary of Argument.

I. This case presents the question whether the Supreme Judicial Court applied correct constitutional standards in holding that certain statements and real evidence must be sup-

pressed at trial because an initial confession was involuntarily obtained. The Commonwealth maintains that the court applied an incorrect standard in that it based its finding on a factual premise which, it will be argued, this Court has rejected, i.e., that custodial interrogation itself supplies sufficient evidence of actual coercion to require a finding of involuntariness where none of the other factors considered by the court are in themselves coercive. The rejection of this factual premise underlying the Court's decision in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), is apparent in this Court's persistent examination of historical Fifth Amendment considerations after determining that the requirements of *Miranda* have been technically violated; if custodial interrogation itself were considered inherently coercive, there would be no need to test the level of compulsion once *Miranda* had been violated in any way. Thus, given that a mere *Miranda* violation is not a per se violation of the Fifth Amendment, a confession is inadmissible only if found to be coercive according to traditional standards of voluntariness.

According to that test, however, the finding of the Supreme Judicial Court of Massachusetts cannot be upheld. In holding that the confession was involuntary, the court utilized a set of factors which are not coercive. When viewed as possibly establishing a setting in which actual coercion might have been exerted, little is gained. Indeed, the conduct of the accused both before and after his arrest is inconsistent with a finding that his will was overborne by police practices. Additionally, the misrepresentation as to the number of identifying witnesses and the admonition that it is better to tell the truth are not coercive and do not render a statement involuntary. To support a finding of involuntariness, what is constitutionally required is that there be a finding of some actual act of coercion. In adding together a set of factors, in themselves not coercive, and holding the confession involuntary, the lower court impermissibly extended the clear requirements of the traditional constitutional standard. The correct constitutional standard, the Commonwealth submits, is that in order for a confession to be held admissible, it must comport with fundamental fairness as required by the Fourteenth Amendment.

However, under a Fourteenth Amendment test — a consideration of the totality of the circumstances under which the confession was obtained — the confession was clearly voluntary. None of the factors which normally provide a foundation for a finding of involuntariness — e.g., torture, prolonged interrogation, injection of truth serum, etc. — was present. Additionally, there existed many positive factors which indicated that the defendant's will was not overborne in any way.

Finally, the prophylactic standards of *Miranda* were complied with completely. This Court has never required more than a "yes" or "no" answer to the questions asked in compliance with *Miranda*; nor has it held that the accused is entitled to an elaborate explanation of the meaning of those rights. That the interrogation following waiver was skillful has no bearing — logical or otherwise — on the quality of the waiver itself. Finally, the ingestion of beer and drugs the night before the interrogation does not preclude a finding of valid waiver of the procedural requirements of *Miranda*. The accused's behavior was not aberrational in any sense and, to the extent that his judgment was impaired, this impairment did not reach a level which precluded the possibility of a knowing, intelligent and voluntary waiver of those procedural requirements.

II. Even if it is deemed that the statement was obtained in violation either of the Fifth Amendment or of the waiver requirements of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), it may be utilized in a collateral proceeding, i.e., as a partial basis for demonstrating probable cause for the issuance of a search war-

rant, and the real evidence seized pursuant to that warrant is admissible at trial.

The Fifth Amendment by its own terms bars only use of compelled testimonial evidence at trial, and it does not bar compulsion of real evidence. This Court has repeatedly rejected a per se application of the exclusionary rule to all proceedings and for all purposes. Therefore, a balancing test is appropriate and, given no flagrant misbehavior on the part of the police, the deterrent purpose of the exclusionary rule would not be effectuated by exclusion of real probative evidence.

Miranda v. *Arizona* was limited to the question of admissibility of statements in the prosecution's case in chief. *Miranda*, at 445. Given that a violation of *Miranda* does not necessarily involve a violation of a constitutional right, the "fruit of the poisonous tree" doctrine is not applicable, for that doctrine is triggered only by an initial constitutional violation. The Supreme Judicial Court has therefore erred in requiring automatic per se exclusion for all purposes.

III. A spontaneous statement made to a family member approximately three hours after the interrogation, that is neither elicited by police nor addressed to them, is not subject to exclusion under the "cat-out-of-the-bag" theory. Such a rule would automatically preclude all voluntary statements made after an illegal interrogation and is not constitutionally required.

Argument.

I. The Decision of the Supreme Judicial Court Falls Within a Recognized Exception to the Finality Requirement of 28 U.S.C. § 1257(3).

Under Massachusetts procedure,[1] an application for interlocutory appeal from an order of the Superior Court determining a motion to suppress may be taken by either the Commonwealth or a defendant. In the instant case, both parties sought relief from the order of the Superior Court. The application was granted and the appeal reported to the full court (Supreme Judicial Court) for hearing (App. 61). The court ordered that a confession, a subsequent admission and certain physical evidence seized pursuant to a warrant be suppressed at trial because they were obtained in violation of the Fifth Amendment. This decision of the highest court of the Commonwealth falls directly into the third category of exceptions to the finality requirement established in *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. 469 (1975).

> "In the third category are those situations where the federal claim has been finally decided, with further proceedings on the merits in the state courts to come, but in which later review of the federal issue cannot be had, whatever the ultimate outcome of the case. Thus, in these cases, if the party seeking interim review ultimately prevails on the merits, the federal issue will be mooted; if he were to lose on the merits, however, the governing state law would not permit him again to present his federal claims for review." 420 U.S. at 481.

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[1] Mass. Gen. Laws, c. 278, § 28E (see, *Petition for Writ of Certiorari*, Appendix A, 1a).

The decision of the court is final and conclusive of the federal issue regardless of the outcome of further proceedings. If the defendant is acquitted, the Commonwealth under both state and federal law is prohibited from appeal. Thus, the instant case presents a stronger example of an exception to the finality rule than *California* v. *Stewart*, 384 U.S. 436 (1966), which heretofore has been held to epitomize this category of cases. In taking jurisdiction in *Stewart*, this Court stated:

> "After certiorari was granted in this case, respondent moved to dismiss on the ground that there was no final judgment from which the State could appeal since the judgment below directed that he be retried. In the event respondent was successful in obtaining an acquittal on retrial, however, under California law the State would have no appeal. Satisfied that in these circumstances the decision below constituted a final judgment under 28 U.S.C. § 1257(3) (1964 ed.), we denied the motion. 383 U.S. 903." 384 U.S. at 498 n.71.

At the time of the *Stewart* decision only state law prohibited the prosecution from appeal.[2] However, under *Benton* v. *Maryland*, 395 U.S. 784 (1969), federal double jeopardy standards are now applicable to the states and therefore under federal law the prosecution is not permitted to present its federal claim for review.

The force of this argument has been noted.

> "In this situation the state is not responsible for its inability to appeal after final judgment, nor are there any means available to the Court by which it can circumvent

[2] *Palko* v. *Connecticut*, 302 U.S. 319 (1937), was controlling.

> the barrier to review after final judgment. An exception to finality could not by definition conflict with the adequate state grounds doctrine. Nor would recognition of such an exception undermine the systematic benefit of the entire case model; the category would be restricted to a small class of cases and its applicability would be clear and predictable." Note, *The Finality Rule for Supreme Court Review of State Orders*, 91 Harv. L. Rev. 1004, 1023 (1978).

The decision of the Supreme Judicial Court carries with it a greater degree of finality than the decision of the California court in *Stewart*. The evidence that the Commonwealth sought to introduce has been finally and absolutely excluded as being obtained in violation of federal principles; however, in *Stewart*, the California Supreme Court had "left the State free to show proof of a waiver." 384 U.S. at 525 (Harlan, J., dissenting). Further litigation of the federal issue in the instant case, however, is precluded.

Finally, the Commonwealth suggests that a pretrial order suppressing evidence which has been reviewed and conclusively determined by the highest court of the state also falls within the so-called "collateral order" exception established in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949).[3] In *Cohen*, the Court classified certain judgments as falling into

> "that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate con-

[3] The reasoning of *Cohen* has been applied to criminal cases. *Stack* v. *Boyle*, 342 U.S. 1 (1951).

sideration be deferred until the whole case is adjudicated." *Id.* at 546. See also *National Socialist Party* v. *Skokie*, 432 U.S. 43 (1977).

In the instant case, the ultimate issue to be determined in the further state court proceeding is the guilt or innocence of the accused. The federal issue presented for review herein is independent of that ultimate issue.

Where a state has provided a procedure for review of a federal issue and a final decision has been rendered on that issue by the highest court of the state, and the party seeking review of that issue in this Court is forever barred by federal and state law from again raising the claim regardless of the outcome of further state proceedings, this Court has jurisdiction to resolve the claim presented under 28 U.S.C. § 1257(3). *Cox Broadcasting Corp.* v. *Cohn*, 420 U.S. at 481.

II. The Supreme Judicial Court has Applied an Incorrect Standard in Holding the Confession to be Inadmissible.

The Supreme Judicial Court affirmed the trial judge's finding that the defendant's confession was involuntary or, as the court stated the issue, "the Commonwealth had not carried the heavy burden of establishing that it was voluntary, see *Commonwealth* v. *Murray*, 359 Mass. 541, 546 (1971); *Miranda* v. *Arizona*, 384 U.S. 436, 475 (1966)." *Commonwealth* v. *Meehan*, _____ Mass. _____, Mass. Adv. Sh. (1979) 710, 721, 387 N.E. 2d 527, 533 (App. 72). The referenced portion of *Miranda* v. *Arizona* provides:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel." 384 U.S. at 475.

The court concluded that the defendant's confession was involuntary and "thus directly offensive to the Fifth Amendment." *Meehan*, 387 N.E. 2d at 536 (App. 77). There is a certain ambiguity in the opinion of the court. On the one hand, the court held that the prosecution did not satisfy its heavy burden of proving a knowing, intelligent and voluntary waiver, 387 N.E. 2d at 533 (App. 72), and, on the other hand, the court held that the confession itself was involuntary, 387 N.E. 2d at 536 (App. 77). Since it is unclear whether the court based its conclusion on a view of the Fifth Amendment's privilege against compelled testimony as applicable to police interrogations or on an apparent equation of a violation of the waiver requirement of *Miranda* with a violation of the Fifth Amendment, both propositions will be addressed.

The Commonwealth will submit that not only is the confession not involuntary under correctly applied constitutional standards, but that there exists no violation of any requirement of *Miranda* v. *Arizona* and, further, that the court below has incorrectly treated *Miranda* requirements as co-extensive with the Fifth Amendment. Finally, the Commonwealth will suggest that the question of the voluntariness of confessions, obtained through police interrogation and their subsequent admissibility, is more properly determined by the Due Process Clause and its inherent requirement of fundamental fairness than by the privilege contained in the Fifth Amendment.

A. *The Fifth Amendment Privilege is Violated Only by Actual Official Coercion.*

It is the Commonwealth's position that in order automatically to bar the use of testimony on the basis that it was obtained in violation of the Fifth Amendment privilege, an official act constituting actual or genuine compulsion must be demonstrated. This requirement was recognized by the Court in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), wherein the application of the Fifth Amendment privilege was extended to extrajudicial interrogation. In making this extension, the Court posited the necessary factual premise that custodial police interrogation was "inherently coercive."

> "An individual swept from familiar surroundings into police custody, surrounded by antagonistic forces, and subjected to the techniques of persuasion described above cannot be otherwise than under compulsion to speak." *Miranda* v. *Arizona*, 384 U.S. at 461.

Such a premise was necessary to support the Court's conclusion that unless the safeguards which the Court then promulgated were complied with and the prosecution established a waiver, any statement must be excluded.

> "Unless adequate protective devices are employed to dispel the compulsion inherent in custodial surroundings, no statement obtained from the defendant can truly be the product of his free choice." 384 U.S. at 458.[4]

The presumption of inherent compulsion was necessary because clearly the words of the Fifth Amendment forbid the

[4] See also *id.* at 457, 467.

"compelling," not the "taking," of statements. Thus the question of waiver would not arise without the initial factual premise that custodial interrogation in itself is coercive.[5] See generally Friendly, *Benchmarks*, 269-272 (1967).

Recent decisions of this Court have necessarily implied a rejection of this factual premise for the majority's holding in *Miranda*, i.e., that police interrogation is so inherently coercive that, without the enumerated warnings and waiver requirements, an individual's decision to speak could not be deemed to be free or voluntary.

In *Michigan* v. *Tucker*, 417 U.S. 433 (1974), this Court noted that the Court in *Miranda* acknowledged that it had gone beyond traditional voluntariness concepts.[6]

> "The Court recognized . . . [in *Miranda*] that these procedural safeguards were not themselves rights protected by the Constitution but were instead measures to insure that the right against compulsory self-incrimination was protected. As the Court remarked:
>
> > "'[W]e cannot say that the Constitution necessarily requires adherence to any particular solution for the inherent compulsions of the interrogation process as it is presently conducted.' *Id.* at 467.
>
> "The suggested safeguards were not intended to 'create a constitutional straightjacket,' *ibid.*, but rather to provide practical reinforcement for the right against compulsory self-incrimination." *Michigan* v. *Tucker*, at 444.

[5] It is apparently the assumption of the Supreme Judicial Court that this premise has continued validity for, as will be discussed *infra*, it points to no specific act of official coercion in reaching its decision that the confession was involuntary.

[6] *Miranda*, at 457.

Rather than employ the premise of *Miranda* and view police interrogation as inherently coercive, the *Tucker* Court's analysis focused solely upon historical Fifth Amendment considerations.

> "A comparison of the facts in this case with the historical circumstances underlying the privilege against compulsory self-incrimination strongly indicates that the police conduct here did not deprive respondent of his privilege against compulsory self-incrimination as such, but rather failed to make available to him the full measure of procedural safeguards associated with that right since *Miranda*. Certainly no one could contend that the interrogation faced by respondent bore any resemblance to the historical practices at which the right against compulsory self-incrimination was aimed.
>
> . . . . . .
>
> ". . . [H]is statements could hardly be termed involuntary as that term has been defined in the decisions of this Court.
>
> . . . . . .
>
> "Our determination that the interrogation in this case involved no compulsion sufficient to breach the right against compulsory self-incrimination does not mean there was not a disregard, albeit an inadvertent disregard, of the procedural rules later established in *Miranda*." *Michigan* v. *Tucker*, at 444-445.[7]

[7] The Commonwealth recognizes that *Tucker* involved a pre-*Miranda* violation, but suggests that that fact does not militate against the view that the Court rejected the initial premise of *Miranda*.

If the Court were of the continued view that custodial police interrogation itself supplied the compulsion necessary to invoke the Fifth Amendment, the question of the sufficiency of the compulsion would not arise.

Unless this Court was rejecting the "inherently coercive" premise, to limit inquiry to historical considerations underlying the Fifth Amendment would be inconsistent with *Miranda*, which by its own terms went beyond the traditional concept of voluntariness. As the Court stated:

> "In these cases, we might not find the defendants' statements to have been involuntary in traditional terms." *Miranda*, at 457.

Oregon v. *Mathiason*, 429 U.S. 492 (1977), continued the implicit rejection of the "inherently coercive" premise. In *Mathiason*, this Court held that a parolee who came to the police station voluntarily, yet at the request of his parole officer, who was told that he was not under arrest, yet was told falsely that his fingerprints had been found at the scene of a burglary, and who then confessed, before being given the *Miranda* warnings, was not in custody for *Miranda* purposes. This Court rejected the view that mere questioning at the station house constitutes a "coercive environment." *Mathiason*, at 495. This result, the Commonwealth respectfully submits, differs substantially from the broad and darkly sinister picture of station house interrogation painted by the majority in *Miranda*.[8] Even without the formal announcement of arrest, Mathiason was subject to the same type of experience the *Miranda* decision sought to protect him against, i.e., the "incommunicado interrogation of individuals in a police-dominated

[8] *Miranda*, at 445-458.

atmosphere, resulting in self-incriminating statements without full warnings of constitutional rights." *Miranda*, at 445.

The Commonwealth submits, therefore, that the premise that all police interrogation is inherently coercive has been rejected and that, without such a premise, the Fifth Amendment's direct command against the *use* of compelled testimony does not operate to require automatic exclusion of statements obtained through police interrogation absent a showing of actual coercion independent of the fact of custodial interrogation itself. Indeed, it is questionable whether, with the rejection of *Miranda's* factual premise, there is any justification for extending the constitutional privilege to an extrajudicial setting at all.

Further indication that the Court has rejected any equation of *Miranda* and the Fifth Amendment is found in recent decisions holding that statements taken in violation of *Miranda* are not per se inadmissible at trial for all purposes. In *Harris* v. *New York*, 401 U.S. 222 (1971), the statements of a defendant who had not been advised of his right to counsel were held admissible for impeachment purposes.

In *Oregon* v. *Hass*, 420 U.S. 714 (1975), the Court, holding that statements taken after a defendant had expressed a desire to speak with an attorney were admissible on rebuttal for impeachment purposes, stated:

> ". . . it does not follow from *Miranda* that evidence inadmissible against Hass in the prosecution's case in chief is barred for all purposes, always provided that 'the trustworthiness of the evidence satisfies legal standards.' [*Harris* v. *New York*,] 401 U.S., at 224." 420 U.S. at 722.

The implication of the these cases is that, contrary to *Miranda*, a confession or statement is not considered to be coerced in the Fifth Amendment sense merely because of failure to give

the warnings or to observe them effectively. Rather, inquiry must be made as to voluntariness in the traditional sense. The Commonwealth submits that, had the Court not abandoned the *Miranda* premise of "inherent coercion," the Court would not have considered the "trustworthiness" of the statements. To do so without an implicit rejection of the "inherent coercion" premise would be inconsistent with the well established principle that statements which are compelled in violation of the Fifth Amendment are per se inadmissible because they are in fact involuntary.

> "The use of coerced confessions, whether true or false, is forbidden because the method used to extract them offends constitutional principles." *Lego* v. *Twomey*, 404 U.S. 477, 485 (1972).

Inquiry as to trustworthiness or reliability is irrevelant to Fifth Amendment violations. *Rogers* v. *Richmond*, 365 U.S. 534, 540-541 (1961). If the statement is coerced, it is involuntary and therefore inadmissible for that reason alone. Hence, had this Court considered *Miranda* to be of parallel constitutional status with the Fifth Amendment, it would be inconsistent, at best, to hold that statements taken in violation of *Miranda* requirements could be found t be "otherwise trustworthy" and thereby admissible in a judicial proceeding.

For the above stated reasons, the Commonwealth suggests that this Court has rejected the factual assumption of the *Miranda* majority[9] and now requires something more than the fact of custodial interrogation to demonstrate actual coercion. If the mere fact of custodial interrogation does not in itself fur-

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[9]See generally, *The Supreme Court, 1973 Term*, 88 Harv. L. Rev. 41, 199-202 (1974); Ritchie, L.J., *Compulsion that Violates the Fifth Amendment: The Burger Court's Definition*, 61 Minn. L. Rev. 383, 418 (1977).

nish evidence of genuine compulsion, the formula employed by the Supreme Judicial Court to determine that the statement was involuntary will not suffice.

B. *A Simple Compilation of Noncoercive Factors does Not Support a Conclusion that a Statement is Involuntary.*

The Supreme Judicial Court based its conclusion that defendant's statement was involuntary on the following factors[10]:

> "The defendant, eighteen years of age, with a poor educational background, uninformed of his right to reach his family or friends, his judgment impaired through intoxication, confessed after being told that the case against him was established and after receiving assurance that the confession would assist his defense." 387 N.E. 2d at 536 (App. 77).

However, none of these factors is in itself coercive, and their relevance to the issue of voluntariness has been specifically limited. They are "relevant *only* in establishing a setting in which actual coercion might have been exerted to overcome the will of the suspect. See *Darwin* v. *Connecticut*, 391 U.S. 346; *Greenwald* v. *Wisconsin*, 390 U.S. 519; *Davis* v. *North Carolina*, *supra*." *Procunier* v. *Atchley*, 400 U.S. 446, 453-454 (1971) (emphasis supplied).

On analysis, these factors add little to establishing a setting for actual coercion. The defendant was not a juvenile. He

[10] It is not only open to this Court, as a matter of federal constitutional law, to apply constitutional principles to the facts as found by the state court (*Brewer* v. *Williams*, 430 U.S. 387, 404 [1977]), but the Court has an affirmative duty to do so. *Haynes* v. *Washington*, 373 U.S. 503 (1963).

had graduated from the ninth grade and had attended two years of high school (Tr. 476). While he was not specifically informed of his right to use a telephone as prescribed by Mass. Gen. Laws, c. 276, § 33A,[11] he was twice given his full warnings as prescribed by *Miranda* and acknowledged each warning (Ex. 14, App. 23).

The court below found that the defendant's judgment was impaired. However, that impairment was the result of the defendant's own voluntary ingestion of alcohol and drugs the previous night. While such a finding is a relevant consideration, it does not automatically invalidate a waiver (*Commonwealth* v. *Hooks* ____ Mass. ____, Mass. Adv. Sh. (1978) 1356, 376 N.E. 2d 857), let alone automatically render a statement involuntary. Indeed, based upon the testimony of both doctors, such impairment could only be deemed minimal[12] and consistent with a hangover.

That the defendant was not so intoxicated as to be rendered, by that reason alone, incapable of voluntarily making a statement is supported by the trial court's own finding that the defendant *voluntarily* accompanied the police to the station house (App. 49), and that he *voluntarily* gave up his sneaker (App. 50). That the defendant was capable of formulating a course of action was demonstrated by the fact that he had determined to go to the unemployment office to appeal the denial of his benefits (Tr. 126-127). Such conduct is not consistent with the picture of a man so overcome by intoxication as to preclude rational decision.

[11] The courts of Massachusetts have never held that violation of this statute requires exclusion of a defendant's statement obtained while in custody. Violation of such a state statute is not, in any event, determinative of voluntariness. See, e.g., *Gallegos* v. *Nebraska*, 342 U.S. 55, 63 (1951); *Lisenba* v. *California*, 314 U.S. 219, 235 (1941).

[12] There was also testimony that the defendant had been observed taking Valium for "a couple of years" (Tr. 272-273).

The remaining factors relied upon by the court are similarly not coercive. Misrepresentation as to the number of identifying witnesses does not constitute coercive police behavior.[13] *Frazier* v. *Cupp*, 394 U.S. 731 (1969). *Michigan* v. *Mosley*, 423 U.S 96 (1975). Nor does the admonition that it is better to tell the truth constitute a police practice which has been denoted coercive, thereby necessarily rendering a statement involuntary. *United States* v. *Barfield*, 507 F. 2d 53 (5th Cir. 1975), *cert. denied*, 421 U.S. 950 (1975). *United States* v. *Glasgow*, 451 F. 2d 557 (9th Cir. 1971). *United States* v. *Ferrara*, 377 F. 2d 16 (2d Cir. 1967), *cert. denied*, 389 U.S. 908 (1967).

It is important to note that the police in this case made no promises. The officer specifically told the defendant that he could make no promises on three occasions (Ex. 14, App. 35, 36).[14] Moreover, an assurance that a suspect's cooperation would be made known to the authorities and that it might bring the defendant some consideration is not a sufficient inducement to render a statement involuntary. *United States* v. *Frazier*, 434 F. 2d 994 (5th Cir. 1970).

Application of *Bram* v. *United States*, 168 U.S. 532 (1897), does not compel a finding of involuntariness in the instant case.[15] In *Bram*, the Court quoted with approval language

[13] The alleged misrepresentation is minimal. John Carroll specifically identified Meehan by name. It is entirely reasonable that the other witness who observed the victim with a young man would have identified Meehan as that man.

[14] This case therefore is distinguishable from *Grades* v. *Boles*, 398 F. 2d 409 (4th Cir. 1968), wherein a defendant who had not been advised of his right to counsel steadfastly refused to admit anything to police officers during several hours of interrogation, but who, when brought to the prosecuting attorney who promised that he would be tried on only one charge and not be charged as a habitual offender, immediately signed a confession. No such promise was made in the instant case.

[15] The application of the Fifth Amendment privilege to the law of confessions in *Bram* has been severely criticized. 8 Wigmore, *Evidence*, § 2266 (1961).

from 3 *Russell on Crimes* 478 (6th ed.), which indicated that a confession to be admissible "must be free and voluntary: that is, must not be extracted by any sort of threats or violence, nor obtained by any direct or implied promises, however slight, nor by the exertion of any improper influence . . .." 168 U.S. at 542-543. However, literal per se application of this stricture is not, it is suggested, required. As the Court itself noted, the question of voluntariness is primarily one of fact and every case, therefore, must turn on its own facts. 168 U.S. at 549.[16]

It is conceded that certain statements of Officer Kelley could be characterized as offering an inducement, but they do not, it is suggested, constitute psychological coercion. The officer stated:

> "If you wish to tell the truth of what happened, then I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it that I cannot promise you anything now." (Ex. 14, App. 35.)

And, in response to the defendant's question, ". . . if I tell you right, it is going to come out in the court," the officer responded:

> "Q. Joe it is going to come out in court eventually. It is going to come out through witnesses, through evidence, stuff like that? As I said before, we are not holding you here on a little thread of evidence. We have a good case here. I am no attorney. I am only a policeman, but we certainly have a case. As I said before, if there is anything

[16] It should also be noted that the defendant in *Bram* was interrogated while stripped naked.

more you want to add to it, and my suggestion is the truth is going to be a good defense in this particular case. So it is up to you Joe? A. I don't know." (Ex. 14, App. 36.)

It should be noted that the first statement was made in the context of making the defendant's cooperation known to the authorities and to his attorney. The second reference does suggest that confession would be better, but to hold that such a suggestion is constitutionally impermissible ignores the realities of police interrogation. *United States* v. *Williams*, 479 F. 2d 1138 (4th Cir. 1973), *cert. denied*, 414 U.S. 1025 (1973). Obviously, the only rational reason for a person to confess is if he thought it was in his best interest. It is unrealistic to insist that police ignore this factor; to do so, it is suggested, renders interrogation virtually meaningless.

Distinction must be made between police threats or promises which present a grisly alternative (*Brown* v. *Mississippi*, 297 U.S. 278 [1936]) or are of a nature likely to produce a false confession in hope of reward or relief, and a simple suggestion of what gain there might be to the defendant in telling the truth, a suggestion which, it is submitted, when read in context of the entire interrogation, was not made repeatedly during a period of prolonged isolation (cf. *Malinski* v. *New York*, 324 U.S. 401 [1945]). It simply cannot be said to be a suggestion designed and sufficient to produce a false confession or a technique likely to overbear the will of the accused. Compare *Spano* v. *New York*, 360 U.S. 315 (1959).

It is suggested that "voluntariness" does not require a total absence of intimidation or inducement. The test is not whether the statement would have been made without the suggestion that it was better to tell the truth. Rather, it is suggested, the test is twofold and requires a demonstration that the trick or inducement is sufficient to produce a false confes-

sion and, on the whole, that the interrogation does not comport with fundamental standards of justice in a civilized society. See generally, *Jurek* v. *Estelle*, 593 F. 2d 672 (5th Cir. 1979); White, *Police Trickery in Inducing Confessions*, 127 U. Pa. L. Rev. 581 (1979).

> "[I]f 'voluntariness' incorporates notions of 'but-for' cause, the question should be whether the statement would have been made even absent inquiry or other official action. Under such a test, virtually no statement would be voluntary because very few people give incriminating statements in the absence of official action of some kind." *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 224 (1973) (citations omitted). See also *Hutto* v. *Ross*, 429 U.S. 28 (1976).

It is suggested that the factors considered by the Supreme Judicial Court are not in themselves coercive and that, simply by adding such factors together, one does not reach a finding of involuntariness. Rather, these factors are relevant only in establishing a setting in which actual coercion might have been exerted to such a degree as "to overcome the will of the suspect." *Procunier*, *supra*, 400 U.S. at 453-454. This constitutional standard requires that actual official coercive conduct (physical or psychological) occur before a finding of involuntariness can be made, and it further recognizes that total freedom from all pressures is not required, but only that no official action can be deemed to have overcome the will of the suspect.

Therefore, the petitioner suggests that the court below incorrectly applied the test for determining voluntariness and impermissibly extended the constitutional stricture against compelled testimony to include situations in which no compulsion, as that term is understood in a constitutional sense, existed.

However, the Commonwealth recognizes that a confession, to be admissible, must be obtained in a manner comporting with fundamental fairness as required by the Fourteenth Amendment. The Commonwealth submits that this is the appropriate test, for it permits a realistic balancing of the degree of compulsion actually exerted against the subjective state of an average defendant; the Commonwealth submits that it has sustained its burden under this test.

C. *The Circumstances Surrounding the Instant Case do Not Support a Conclusion that the Defendant's Will had been Overborne so as to Render his Statement Violative of Federal Constitutional Standards.*

While the Commonwealth does not suggest that the Court may determine voluntariness simply by a mere "color-matching of cases," *Reck* v. *Pate*, 367 U.S. 433, 442 (1961), it does suggest that comparison of the circumstances found in the instant case and those factors which have led to a finding of involuntariness will present some relevant guidelines for decision.

There is not present in this case any gross abuse which has in other cases compelled a finding of involuntariness, such as beatings, see *Brown* v. *Mississippi*, 297 U.S. 278 (1936), or "truth serum[s]," see *Townsend* v. *Sain*, 372 U.S. 293 (1963); nor is the defendant either mentally defective or insane, cf. *Culombe* v. *Connecticut*, 367 U.S. 568 (1961) (defendant mentally defective); *Fikes* v. *Alabama*, 352 U.S. 191 (1957) (defendant a highly suggestible schizophrenic); nor does this case involve any prolonged interrogation, cf. *Blackburn* v. *Alabama*, 361 U.S. 199 (1960) (defendant insane and incompetent, confessed after 8-9 hours of incommunicado interrogation); *Davis* v. *North Carolina*, 384 U.S. 737 (1966) (defendant in custody for 16 days, interrogated daily). Moreover, there was, it is submitted, no deception of a magnitude which would compel a finding of involuntariness, cf. *Spano* v. *New York*, 360 U.S. 315 (1959) (childhood friend, a policeman, during four interrogations made misrepresentations to gain defendant's sympathy and confession); *Leyra* v. *Denno*, 347 U.S. 556 (1954) (confession induced by psychiatric manipulation); and there were no direct threats or promises, see *Lynum* v. *Illinois*, 372 U.S. 528 (1963) (promises of recommended leniency and threat of loss of children).

It is not only the absence of gross factors indicating involuntariness but the presence of positive factors which indicate that the defendant's "will to resist" was not overborne. *Rogers* v. *Richmond*, 365 U.S. 534, 544 (1961). The defendant was at the outset of the interrogation advised of his rights as required by *Miranda*.[17] He acknowledged each warning (Ex. 14, App. 23). He was then asked: "Are you willing to talk to me about Maryann Birks?" He answered, "Yes." The interrogation then began. No serious argument can be made that this exchange is not a sufficient waiver under *Miranda*. *North Carolina* v. *Butler*, ____ U.S. ____, 99 S. Ct. 1755 (1979).

The defendant had no difficulty in answering general questions about his age, address, description of his home and telephone number. Nor can it be said that he was unaware of the precarious nature of his predicament. He first denied he knew the victim, then admitted talking to her (Ex. 14, App. 23-24), then said he last saw her the previous Tuesday (Ex. 14, App. 24). He attempted to explain away the blood on his sneakers (Ex. 14, App. 25),[18] and he attempted to mitigate his

[17] On this fact, there can be no quarrel, as a contemporaneous tape recording was made (Ex. 14). A full transcription of this recording appears in the Single Appendix at pp. 22-42.

[18] He was sufficiently alert to attempt to correct the officer that blood appeared on only one sneaker (Ex. 14, App. 25).

actions, claiming he was "whacked out" (Ex. 14, App. 41), that he was high on Valium and that the victim was "making fun of [him] . . . and [he] flipped out" (Ex. 14, App. 36).

Moreover, the defendant's own affidavit in support of the motion to suppress (App. 13) does not allege compulsion or involuntariness. He stated:

> "9. At the time I was questioned I was unaware of the need for a lawyer or of my right to a lawyer and I was frightened."

Such assertions weaken any argument that the statement was involuntary. *United States* v. *Diop*, 546 F. 2d 484 (2d Cir. 1976). There can be no doubt that the defendant was advised of his right to counsel (Ex. 14, App. 23), and that he was apprised of the seriousness of his situation (Ex. 14, App. 23). That he was frightened indicates that he was quite aware of his situation — a situation in which, it is suggested, any normal person would be fearful. In any case, that a suspect is fearful or apprehensive does not render a confession involuntary. *Grooms* v. *United States*, 429 F. 2d 839 (8th Cir. 1977).

The criticisms leveled by the state court — that the interrogation was skillful (App. 57), that the police asked leading questions (App. 56) — seem to view an ordinary police investigation of an unsolved crime as an analogue of a criminal trial and, at least inferentially, suggest that the same constitutional requirements apply. The Commonwealth suggests that the Constitution does not so require, and further suggests that such a view is an unfortunate consequence of basing limitations on extrajudicial interrogation on the Fifth Amendment, rather than on the Due Process Clause.

In summary, the defendant was not held incommunicado and was not subjected to protracted interrogation — his initial

contact with the police to the completion of his statement lasted but approximately two hours; he was advised of his rights to remain silent and of his right to counsel; he claimed neither. He was advised of the seriousness of the offense, and he was not denied food or sleep. Although he was young and of mediocre educational background, his responses were, it is suggested, generally appropriate (Tr. 150-151, 608-609). As to impairment of judgment, the police specifically inquired of his ability to understand (Ex. 14, App. 35-36). The questioning techniques employed by the police were indeed designed to produce answers and were, it is suggested, requisite to the solution of the crime. This Court has never held such techniques to be per se unconstitutional; rather, it is only where such techniques are so unnecessary (cf. *Haynes* v. *Washington*, 373 U.S. 503 [1963]), or so oppressive as to offend notions of common decency (cf. *Malinski* v. *New York*, 324 U.S. 401, 407 [1945]), that the bounds of due process are held to have been exceeded. See *Haynes, supra*, at 515.

Under the totality of the circumstances, therefore, it cannot fairly be said that the will of the accused may be properly considered to have been "overborne."

D. *The Statement was Obtained in Full Compliance with Miranda v. Arizona, 384 U.S. 436 (1966).*

The defendant, in accordance with *Miranda*, was fully advised of his rights to counsel and to remain silent. He acknowledged each and responded that he understood (Ex. 14, App. 23). Neither *Miranda* nor any other case in this Court requires an elaboration on the meaning of these rights or requires more than a one-word "yes" or "no" answer. *North Carolina* v. *Butler*, ____ U.S. ____, 99 S. Ct. 1755 (1979).

The trial court and apparently the Supreme Judicial Court are of the view that *Miranda* additionally requires that a

defendant be informed that waiver may "expose . . . [him] to . . . serious and lifelong consequences" (App. 52). Such a requirement goes beyond *Miranda*.

The skillfulness of the interrogation which followed the waiver cannot logically be considered retrospectively to invalidate the prior waiver which occurred when the defendant after acknowledging his rights answered "yes" to the question "Are you willing to talk to me about Maryann Birks?" (Ex. 14, App. 23). At no time during the interrogation did the defendant claim his privilege or request counsel.[19]

The only question is whether an 18-year-old man with "moderate and limited schooling" (App. 52), who had taken Valium and beer the night before interrogation, may effectively waive his rights. The transcript of the interrogation reveals no aberrational conduct on the part of the defendant. Indeed, it reflects the defendant's attempt to misdirect the officers as to the extent of his acquaintance with the victim (Ex. 14, App. 24, 28) and to explain the blood on his sneakers (Ex. 14, App. 25, 26).

In addition to the defendant's ability to respond, as evidenced by the transcript of his statements (Ex. 14, App. 22-42), the officers testified that his responses were coherent and that there were no obvious indications that the defendant was under the influence of alcohol or drugs (Tr. 150-151, 608-609). It is suggested that the effects of alcohol and drugs, the major

[19]The only possible indication of an attempt to terminate questioning occurred when, after nine questions concerning the victim's clothing, the defendant answered, "No," in response to the question: "Is there anything else, Joe, that you would like to tell us?" (Ex. 14, App. 32-33). In context, this reply merely indicated he had nothing more to say about the victim's clothing, and the matter was dropped. *Michigan* v. *Mosley*, 423 U.S. 96 (1975), held that there is no per se proscription of indefinite duration against further questioning on any subject merely because a suspect indicates a desire to remain silent.

portion of which had been consumed fourteen hours earlier (Tr. 563), during which time the defendant had slept and eaten breakfast (Tr. 538-539), could not be deemed to have rendered him incapable of executing a waiver.

Here, it was not found that the defendant was intoxicated, but merely that his judgment was somewhat impaired by prior ingestion of alcohol or drugs. Such impairment is not sufficient to invalidate a waiver. Cf. *Britt* v. *Commonwealth*, 512 S.W. 2d 496 (Ky. 1974). To hold otherwise, it is submitted, would result in a near per se ban on interrogation of habitual users of drugs or alcohol. It would place upon the police a "straightjacket" not even contemplated by *Miranda*.

III. There is No Constitutional Requirement that Statements Obtained in Violation of the Fifth Amendment or of the Prophylaxes of Miranda be Subject to Per Se Exclusion for All Purposes in All Proceedings.

The court below held that certain items of clothing obtained from the defendant's home pursuant to a legally obtained search warrant must be suppressed because the defendant's illegally obtained statement was used to form the basis for a finding of probable cause. The court held that exclusion was required "simply on the ground that the confession was involuntary and thus directly offensive to the Fifth Amendment." *Commonwealth* v. *Meehan*, ____ Mass. ____, Mass. Adv. Sh. (1979) 710, 727, 387 N.E. 2d 527, 536 (App. 77). However, it will be suggested, the Fifth Amendment's automatic bar to the use of compelled testimony does not extend, by its own terms, to the proceeding in question, nor to the evidence sought to be introduced. Moreover, a violation of *Miranda* safeguards does not require automatic disqualification of a confession for all purposes, let alone trigger the doctrine of *Wong Sun* v. *United States*, 371 U.S. 471 (1963).

A. *The Fifth Amendment Exclusionary Rule has No Application to Either the Proceeding or the Evidence Involved.*

The Fifth Amendment precludes by its own terms use of judicially compelled testimonial evidence at a criminal *trial*. The Amendment was historically directed to the abuses of the Inquisition and Star Chamber proceedings and designed to prohibit judicial compulsion of incriminating testimony under oath.[20] It is only the introduction of the defendant's testimony at trial that is barred by the privilege. And it is only *testimony* that may not be compelled. Here, the statement was utilized only in seeking issuance of a search warrant. It was not, at this point, being utilized for trial purposes, nor to establish guilt or innocence. Moreover, the Fifth Amendment bar to compulsion is not absolute. "[T]hat compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it." *Schmerber* v. *California*, 384 U.S. 757, 764 (1966). See also *Keister* v. *Cox*, 307 F. Supp. 1173, 1176 (W.D. Va. 1969).

The testimonial content of the statement is not here being used as evidence of guilt or innocence — it is the real evidence to be introduced at trial which goes to that determination, and the Fifth Amendment is not directed against the compulsion to produce real or physical evidence. *Gilbert* v. *California*, 388 U.S. 263, 265-267 (1967); *United States* v. *Wade*, 388 U.S. 218, 222-223 (1967); *Holt* v. *United States*, 218 U.S. 245 (1910). To extend the Fifth Amendment to bar use of the statement in such a proceeding and to such evidence as is involved herein is, therefore, unwarranted.

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[20] See, e.g., *Ullmann* v. *United States*, 350 U.S. 422, 428 (1956); 8 Wigmore, *Evidence*, § 2250, pp. 267-295 (1961); Friendly, *Benchmarks*, 270-271 (1967).

Moreover, such a per se approach as was adopted by the court below runs counter to this Court's declaration that there is no absolute constitutional prohibition against the use of illegally obtained evidence for all purposes in all proceedings.

> "Despite its broad deterrent purpose, the exclusionary rule has never been interpreted to proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974), quoted in *Brown* v. *Illinois*, 422 U.S. 590, 600 (1975).

For example, the Court has consistently held that an indictment returned by a properly constituted grand jury is not subject to challenge on the ground that it was based on unconstitutionally obtained evidence. *United States* v. *Blue*, 384 U.S. 251 (1966); *United States* v. *Calandra*, 414 U.S. 338 (1974).[21]

Similarly, the Court has declined to extend the exclusionary rule to hold inadmissible in a federal civil tax proceeding evidence obtained by a state law enforcement officer pursuant to a search warrant later proved to be defective. *United States* v. *Janis*, 428 U.S. 433 (1976). Most recently, this Court has held admissible living witness testimony which was the fruit of an illegal search. *United States* v. *Ceccolini*, 435 U.S. 268 (1978).

The thrust of these cases, it is submitted, constitutes an obvious rejection of a per se, inflexible application of the exclusionary rule to proscribe use of illegally seized evidence for all purposes in all proceedings. The inflexible application of the exclusionary rule utilized by the court below is simply not required under federal standards.

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[21] If an indictment is not vitiated as a result of the use of such evidence, it is difficult to understand why an otherwise valid search warrant (certainly a far less onerous burden on the accused) would be vitiated.

If the exclusionary requirement inherent in the Fifth Amendment does not extend to the instant situation, then it is only the "fruit of the poisonous tree" doctrine enunciated in *Wong Sun* v. *United States, supra,* which would justify exclusion of the statement from the proceeding here at issue.

B. *There is No Requirement that the "Fruit of the Poisonous Tree" Doctrine be Automatically Applied to Fifth Amendment Violations.*

While this Court has indicated that, in a proper case, the rationale of *Wong Sun* v. *United States, supra,* might be applicable to Fifth Amendment violations in addition to Fourth Amendment violations, *Michigan* v. *Tucker,* 417 U.S. 433, 447 (1974), this is not the proper case for such application. In this case, there is no actual compulsion — either physical or psychological — such as is generally understood in Fifth Amendment terms. Rather, the circumstances leading to a finding of involuntariness either as to waiver or as to the confession itself involve the defendant's subjective reaction to his surroundings and to police interrogational procedures which in other instances have been held to be not in themselves coercive.

Under these circumstances, a balancing test is appropriate and permissible.[22] It should take into account the nature of

[22] In *New Jersey* v. *Portash,* ____ U.S. ____, 99 S. Ct. 1292 (1979), this Court reached the opposite conclusion. However, the circumstances of that case were quite dissimilar. The State argued that under the balancing test of *Harris* v. *New York,* 401 U.S. 222 (1971), and *Oregon* v. *Hass,* 420 U.S. 714 (1975), it should be permitted to use immunized grand jury testimony to impeach inconsistent statements at trial. Noting that a grant of legislative immunity — talk or government sanctions will be imposed — constitutes the privilege in its most "pristine" form, this Court held that any balancing of interests in the decision to exclude such testimony from a criminal *trial* was impermissible and that all compelled statements were barred for testimonial use at trial. However, the instant case involves neither judicial nor legislative compulsion, nor use of testimony at trial.

the proceeding in which the statement is sought to be used, the nature of the violation, and the effect of applying the exclusionary rule, balanced against the interests of society and justice in having guilt or innocence determined on the basis of trustworthy evidence.

1. *Nature of the collateral proceeding.* The statement in question was utilized to form the basis for probable cause for issuance of a search warrant. Evidence otherwise inadmissible at trial because it is hearsay has traditionally been an appropriate basis for a finding of probable cause. The only constitutional limitation is that it be reliable. *Spinelli* v. *United States,* 393 U.S. 410 (1969); *Aguilar* v. *Texas,* 378 U.S. 108 (1964). Here the reliability of the statement is quickly verifiable. The evidence will be discovered, or it will not. If it is discovered, the statement obviously was reliable. If the evidence is not discovered, the defendant will not, in any way, be disadvantaged by the use of his statement.

Moreover, a proceeding to determine probable cause for issuance of a search warrant may be characterized as an ex parte, summary proceeding, not an adversarial proceeding. Such a distinction has been noted by lower federal courts wherein they have declined to exclude evidence obtained in violation of *Miranda* v. *Arizona, supra.* See *United States ex rel. Sperling* v. *Fitzpatrick,* 426 F. 2d 1161 (2d Cir. 1970) (parole revocation hearing); *United States ex rel. Vitiello* v. *Flood,* 374 F. 2d 554 (2d Cir. 1967) (extradition proceeding). It is submitted that exclusion at trial of an illegally obtained statement is sufficient to provide deterrence and that exclusionary rules do not apply to collateral proceedings not designed to establish guilt or innocence.

2. *The nature of the violation permits of a balancing test.* If, indeed, this case involves an involuntary confession rather than a confession obtained in the absence of a knowing, intelligent and voluntary waiver as required by *Miranda*, the facts do not support a finding of "genuine compulsion of testimony" (*United States* v. *Washington*, 431 U.S. 181, 187 [1977]), requiring automatic exclusion. Rather, it is suggested, a balancing test is appropriate and due weight should be given to whether the purpose behind the application of the exclusionary rule would be met by its application here. Here, the court below reached its decision, not based solely upon any official act of genuine compulsion, but on the defendant's subjective state — his age, educational experience, and the possible effects of his prior voluntary ingestion of alcohol and drugs which the court apparently determined to render him without capacity to confess voluntarily (or waive his rights). Under these circumstances, the "fruits" doctrine should not be applied. The only purpose justifying application of the exclusionary rule is to deter future police misconduct. *United States* v. *Calandra*, 414 U.S. 338, 347 (1974).

Where there is no police misconduct of a nature which offends civilized notions of decency, and the confession is rendered involuntary only as a result of a compilation of circumstances largely created by the defendant himself, no deterrent purpose would be achieved. There is, it is suggested, no justification for depriving the finders of fact of real probative evidence in such an automatic fashion as exhibited by the court below.

In *Brown* v. *Illinois*, 422 U.S. 590 (1975), this Court while applying the "fruits" doctrine to exclude a statement made subsequent to an illegal arrest (no probable cause), recognized that exclusion was not automatic, but that the decision must be based on analysis of several factors, "particularly, the purpose and flagrancy of the official misconduct . . .." 422 U.S. at 604.

In the instant case, the police are criticized for carrying out a "skillful interrogation," for asking leading questions, for not eliciting more than one-word answers, for making a slight misrepresentation as to the weight of the evidence, and for suggesting that it would be better to tell the truth. Such conduct, it is suggested, does not constitute a deliberate attempt to subvert constitutional rights. Suppressing real evidence obtained pursuant to a valid search warrant "would hardly have served an important demonstrative purpose of deterring the police from future malfeasance." *Commonwealth* v. *Fielding*, 371 Mass. 97, 114 (1967) (footnote omitted).

Application of the exclusionary rule is even less appropriate in the case at hand, where police officers possessed sufficient information, in addition to the confession, to obtain a search warrant. At the time of application for the warrant, the police had been informed that the defendant and the victim were seen together, that the defendant had offered contradictory explanations of the stains on his sneakers, that the sneakers were stained with blood and that a person fitting his description had been seen leaving the scene of the murder just after the screams of a woman had been heard. Indeed, the Supreme Judicial Court conceded that the police had probably sufficient evidence to justify the issuance of the warrant. 387 N.E. 2d at 536 (App. 77).

C. *The Automatic Exclusion of Statements Obtained in Violation of the Waiver Requirement of Miranda v. Arizona, 384 U.S. 436 (1966), is Not Constitutionally Required.*

Assuming that the confession is not involuntary and in direct conflict with the Fifth Amendment privilege against compelled

testimony, on the Supreme Judicial Court's analysis it may be deemed that the prosecution has failed to meet the burden of proving waiver as required by *Miranda* v. *Arizona*, at 445. However, this conclusion does not necessarily involve a violation of the Fifth Amendment, and the Supreme Judicial Court is in error in treating *Miranda* requirements as co-extensive with the Fifth Amendment. If only a *Miranda* violation not involving the Fifth Amendment has occurred, the "fruits" doctrine, it will be argued, is not applicable.

As has been suggested, it appears clear that the warning and waiver requirements of *Miranda* do not have independent, immutable, constitutional status, but are merely judicially created regulations for implementing constitutional commands. See generally, *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975).[23]

Michigan v. *Tucker*, *supra*, is unequivocal in its assertion that a violation of *Miranda* does not necessarily involve a violation of a constitutional right. *Tucker*, 417 U.S. at 444-445. In *Tucker*, the Court, although finding that *Miranda* had been violated, did not apply the *Wong Sun* doctrine, stating:

[23] The waiver requirement of *Miranda* does not enjoy any greater constitutional status than the other prophylactic rules, as is evidenced by the concurring opinion of Mr. Justice Blackmun in *North Carolina* v. *Butler*, ___ U.S. ___, 99 S. Ct. 1755 (1979):

> "I join the opinion of the Court. My joinder, however, rests on the assumption that the Court's citation to *Johnson* v. *Zerbst*, 304 U.S. 458, 464 . . . (1938), *ante* at 1758, is not meant to suggest that the 'intentional relinquishment or abandonment of a known right' formula — the formula *Zerbst* articulated for determining the waiver *vel non* 'of fundamental constitutional rights,' 304 U.S., at 464 . . . — has any relevance in determining whether a defendant has waived his 'right to the presence of a lawyer,' *ante*, at 1758, under *Miranda's* prophylactic rule." 99 S. Ct. at 1759.

> "This Court has also said, in *Wong Sun* v. *United States*, . . . that the 'fruits' of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed. But we have already concluded that the police conduct at issue here did not abridge respondent's constitutional privilege against compulsory self-incrimination, but departed only from the prophylactic standards later laid down by this Court in *Miranda* to safeguard that privilege." *Tucker*, at 445-446.

The clear implication of *Tucker* is that the "fruit of the poisonous tree" doctrine would not be triggered unless that primary illegality involved an invasion of a specific constitutional guarantee and that a mere *Miranda* violation does not reach such a constitutional dimension.[24]

The "fruits" doctrine has been held by several lower courts to be inapplicable to *Miranda* violations in the absence of involuntariness. *United States ex rel. Hudson* v. *Cannon*, 529 F. 2d 890 (7th Cir. 1976);[25] *Simmons* v. *Clemente*, 552 F. 2d 65 (2d Cir. 1977). See *Bartram* v. *State*, 33 Md. App. 115, 364

[24] This interpretation is consistent with *Brown* v. *Illinois*, 422 U.S. 590 (1975). In *Brown*, the initial coercion arose from an arrest without probable cause in direct contravention of a constitutional guarantee. The Court merely held that the subsequent giving of *Miranda* warnings could not dissipate that taint.

[25] The Ninth Circuit, in *United States* v. *Lemon*, 550 F. 2d 467, 472 (9th Cir. 1977), did not resolve this issue, for the court held that a statement eliciting a consent to search did not implicate a Fifth Amendment right and therefore *Miranda* was inapplicable. The court, noting that *Miranda* warnings are not constitutional rights in themselves, did, however, hold that statements elicited prior to *Miranda* warnings could be introduced at a pretrial suppression hearing to establish the validity of a search. But see *Tremayne* v. *Nelson*, 537 F. 2d 359 (9th Cir. 1976). See also *Null* v. *Wainwright*, 508 F. 2d 340 (5th Cir. 1975), *cert. denied*, 421 U.S. 970 (1975).

A. 2d 1119 (1976), and cases cited therein;[26] *Rhodes* v. *State*, 91 Nev. 17, 530 P.2d 1199 (1975).

The Commonwealth submits that the only justification for extension of the *Wong Sun* doctrine to situations involving the Fifth Amendment flows from a determination that the initial statement leading to derivative real evidence was involuntary as a result of compulsion or intentional bad faith conduct on the part of police which could be deemed to have "overborne the will" of the accused. It is submitted that the conduct of the police in this case was not flagrant nor did it result in the deprivation of a personal constitutional right.

Where there has been no flagrant violation of either the Fifth Amendment or the prophylaxes of *Miranda*, to require a blanket application of the exclusionary rule is, the Commonwealth suggests, overkill and is not compelled by federal standards.

> "I tend generally to share the view that the *per se* applicaton of an exclusionary rule has little to commend it except ease of application. All too often applying the rule in this fashion results in freeing the guilty without any offsetting enhancement of the rights of all citizens. Moreover, rigid adherence to the exclusionary rule in many circumstances imposes greater cost on the legitimate demands of law enforcement than can be justified by the rule's deterrent purposes. . . . I therefore have indicated, at least with respect to Fourth Amendment violations, that a distinction should be made between flagrant

[26] In *In re Appeal No. 245*, 29 Md. App. 131, 349 A. 2d 434 (1975), the court acknowledged the distinction, but found a fundamental violation of the constitutional right against self-incrimination. It is important to note that the court also found the initial illegal detention to be "patently flagrant." 29 Md. App. at 145, 349 A. 2d at 442.

> violations by the police, on the one hand, and technical, trivial, or inadvertent violations, on the other." *Brewer* v. *Williams*, 430 U.S. 387, 413-414 n.2 (1977) (concurring opinion of Mr. Justice Powell).

The Commonwealth recognizes that the Fifth Amendment may be implicated in the instant case, but suggests that a contrary approach is not mandated. This case simply does not involve any conduct on the part of the police which could be deemed to constitute an intentional attempt to deny the defendant his constitutional rights. Compare *Brewer* v. *Williams*, 430 U.S. 387 (1977).

Therefore, the Commonwealth submits that the deterrent purpose of the exclusionary rule would have little effect in this case, for there was no intention to violate any rights of the defendant, and the Commonwealth possessed evidence obtained independently of the illegally obtained confession to support issuance of the search warrant.

IV. The "Cat-out-of-the-Bag" Theory does Not Require Suppression of All Statements Made Subsequent to an Illegally Obtained Confession.

Approximately four hours after the interrogation, the defendant's mother and brother arrived at the police station (Tr. 614). After being advised of the circumstances underlying the defendant's arrest and that he had confessed, the family was escorted to the defendant's cell (Tr. 614). An officer testified that as the family appeared, the defendant cried out, "Ma, I didn't mean to hit her so hard" (Tr. 615). The defendant and his mother testified, "he said only, 'I'm sorry, Ma'" (Tr. 487). The Supreme Judicial Court ruled that the

statement must be suppressed. Given the illegality of the initial confession, the subsequent statement was inadmissible under the "cat-out-of-the-bag" theory. The Commonwealth respectfully suggests that the court below has misconstrued the law.

This Court has never held that the making of a confession under circumstances precluding its use at trial precludes use of all later voluntary inculpatory statements. *United States* v. *Bayer*, 331 U.S. 532 (1947). The determinative factors relevant to the instant case are that the statement was spontaneous, was an expression of regret directed to a family member and was not in any sense elicited by interrogation, nor directed to the police. The "cat-out-of-the-bag" theory requires suppression only if, after a prior improper confession, the defendant is motivated by the belief that any effort to withhold information would be futile and that no harm can be done by repetition or amplification of his earlier statements. *Darwin* v. *Connecticut*, 391 U.S. 346 (1968). In *Darwin*, as in other cases relied upon by the lower court,[27] the subsequent statement was elicited by further police interrogation. The circumstances surrounding the statement at issue do not meet this standard: there was no attempt to obtain information on the part of the police; therefore, no consideration of whether an effort to withhold the information would be futile is appropriate and the statement was not repetitious of the prior confession. It was, rather, an expression of regret to a family member.

Copeland v. *United States*, 343 F. 2d 287 (D.C. Cir. 1964), provides the correct two-prong test. To exclude the statement, the court must find "(a) that it would not have been made but for the interrogation and (b) that it was a result — a

[27] See, e.g., *United States* v. *Gorman*, 355 F. 2d 151 (2d Cir. 1965); *Brown* v. *Illinois*, 422 U.S. 590 (1975).

fruit — of deliberate exploitation by police of interrogation . . . ." *Copeland*, 343 F. 2d at 291.

The first prong of the test is not met in the instant case. The defendant was placed under arrest prior to the interrogation. It is reasonable to suggest that his relatives would arrive at the police station at some point, and it is sheer speculation to assume that the defendant would not have made his spontaneous expression of regret to his mother, absent his prior confession. As the court stated in *Copeland*, 343 F. 2d at 291:

> "Whatever the force to the 'cat-out-of-the-bag' argument in determining a nexus between two successive confessions to police, it would seem to have none as to a spontaneous, unsolicited and unexpected comment addressed only to a victim. An apology to a private citizen is a different breed of 'cat' from the kind involved in a statement to police."

The second prong of the test is equally unsatisfied. Far from any deliberate exploitation of the original confession on the part of the police, they played no role in the statement at issue, except, by happenstance, to be present. They did nothing to prompt the defendant's expression of regret to his mother, nor was the exclamation addressed to them. This case is clearly distinguishable from *Ricks* v. *United States*, 334 F. 2d 964 (D.C. Cir. 1964), relied upon by the court below. In *Ricks*, the apologies were made in the course of the police interrogation and with the direct involvement of the police, who arranged the confrontation. Similarly, *State* v. *Paz*, 31 Or. App. 851, 572 P. 2d 1036 (1977), offers no support for the lower court's position. There, the defendant's telephone call to his parents was predicated upon his first making a confession; a call was made during the course of continued inter-

rogation and after the police had brought in an interpreter to transcribe it. In the instant case, there is no such police involvement. The Commonwealth therefore suggests that the Supreme Judicial Court has applied the exclusionary rule far beyond that which is constitutionally required or contemplated by the rulings of this Court.

Conclusion.

For the reasons stated above, the decision of the court below should be reversed.

Respectfully submitted,

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CORRECTED COPY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 78-1874

COMMONWEALTH OF MASSACHUSETTS,

Petitioner,

v.

JOSEPH MEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR THE RESPONDENT

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IN THE

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Petitioner,

v.

JOSEPH MEEHAN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS

BRIEF FOR THE RESPONDENT.

OPINION BELOW, STATEMENT OF JURISDICTION, CONSTITUTIONAL PROVISIONS . . .

The Respondent is satisfied with the presentation in the Brief of the Petitioner as to the matters specified in Subsections (a), (b), and (c) of Subsection 1 of Rule 40.

QUESTIONS PRESENTED FOR REVIEW

I. Whether or not the lower court was correct in affirming a trial judge's determination that a confession was involuntary in the totality of the circumstances in this case.

II. Whether or not the lower court acted properly in affirming the trial judge's exclusion of certain real evidence that was seized pursuant to a search warrant which rested upon the involuntary confession.

III. Whether or not an inculpatory admission, corroborative of the initial confession, was properly suppressed where it appears that there are no insulating factors between the two statements.

STATEMENT OF THE CASE

PRIOR PROCEDURE

Respondent Joseph Meehan was by indictment charged with first-degree murder on August 11, 1976 (A. 1, 11). Meehan filed, prior to his trial, a motion to suppress certain tangible evidence and certain statements purportedly made by him while in the custody of detectives on June 11, 1976 (A. 4, 12-15). Two affidavits were submitted to the trial court at the time of the filing of the motion to suppress (as required by local practice, Massachusetts Superior Court Rule 61) (A. 13-15). In addition, a "Motion To Amend Existing Motion To Suppress" was filed by leave of Court, during the hearing on the defendant's motion (A. 6, 15-16). The hearing commenced on May 16, 1977, and continued for seven trial days. The motion was taken under advisement by the trial judge on June 1, 1977 (A. 5-6).

On August 8, 1977, the trial court filed a "Memorandum of Decision" with reference to the Motion to Suppress, granting the motion in part, and denying the motion in part (A. 6, 43-60). Thereafter, in accordance with an available Massachusetts practice, the Commonwealth made application for interlocutory appeal [Massachusetts General Laws, Chapter 278 §28E] and the defendant made cross application for interlocutory appeal under the same statute (A. 7). On September 28, 1977, a Single Justice of the Massachusetts Supreme Judicial Court, after hearing, reported the cross applications to the full bench of the Court for hearing (A. 61). On March 19, 1979, after the issues had been briefed and argued, that Court reversed the order of the trial judge insofar as it denied the defendant's motion to suppress as to one inculpatory admission and, in all other respects, affirmed the order of the trial judge. The case was remanded to the trial court for further proceedings consistent with its opinion. (A. 61-62).

STATEMENT OF THE FACTS

On Friday, June 11, 1976, at about 6:30 in the morning, Boston Police found the body of a young lady on a lawn in the Hyde Park section of Boston (A. 43, 63). There was some blood near the decedent's head and a large rock was found near the body (A. 43, 63).

Following the discovery of the body, the police immediately initiated an investigation and interviewed a number of people who lived in the neighborhood (A. 44, 63-64). Police also began to interview and question individuals believed to have been in the area of Cleary Square on the evening of June 10 and the early-morning hours of June 11, 1976 (A. 44, 63).[1]

Witness (and neighbor) Wilde told police that she was awakened on the morning of June 11 at about 2:00 or 2:30 by the

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[1]Cleary Square is not fully described in the record. However, the lower court notes that it is "nearby" to 40 Oak Street, the area where the decedent was found, and Cleary Square is further described by the lower court as "a familiar gathering place." (A. 63)

sound of a barking dog, then went to the window and heard a tapping noise (A. 45, 63). While at the window she said she saw a white male, in his mid-twenties, walking by her house (A. 45, 63). The man was about five feet ten, of medium-slender build, and about 150 pounds, having dark hair and wearing faded jeans and what appeared to be a long-sleeved shirt with the sleeves rolled up (A. 45, 63). Wilde did not see the face of the man (A. 45, 64).

From the interviews of other neighbors (Crowley, Giardini, Stella and McCarthy), police learned that there were some sounds at slightly after 2:00 in the morning in the area where the decedent had been later found (A. 44-45).

While some police officers were conducting these interviews of neighbors, other police investigators were interviewing, and attempting to locate for questioning, individuals who had been in the Cleary Square area on the evening of June 19, 1976 (A. 45, 64-65). Ventola and Caroll were two such witnesses.

Witness Ventola told police that he knew the decedent and had seen her in the company of a young white male, around midnight, on the evening of June 10, 1976, sitting on the steps of a church (A. 46, 64). He described the white male as seventeen or eighteen years old and that the male was not wearing a shirt (A. 46, 64).

Witness Carroll claimed that he had seen Joseph Meehan sitting on some church steps with the decedent between 11:30 and 12:00, midnight, on the evening of June 10, 1976 (A. 46, 64). Carroll (who had been brought from his home by a police officer to the station) informed police (Detective Solari) that Joseph Meehan was 18 or 19 years old, five feet, six inches, about 130 pounds (A. 46, 64). He said Meehan had dark hair, and was wearing sneakers and a print shirt with long sleeves that were rolled up (A. 64). As the questioning of Carroll was in progress, Carroll remarked that he could then see Joseph Meehan through the station house window, "thumbing" a ride on the street outside the police station (A. 46, 64-65). Solari immediately left the police

station by jumping out of a window in the detectives' room.[2]

In the meanwhile, and at Solari's directive, Officer Cannon and Detective Russo left the police building by the front door (A. 46). Solari alerted Cannon to alert other police officers (I Tr. 120). Cannon got into an unmarked police car in front of the station, made a "U turn" on the street, and, with Detective Solari in the car, proceeded up Hyde Park Avenue, pursuing Meehan (A. 46, 64). The car was used because if Meehan were successful in hitching a ride the officers intended to follow the car (A. 46, 64). Officer Russo followed Meehan up the sidewalk (A. 64).

Officers Solari and Cannon then pulled up alongside Joseph Meehan in the police cruiser (A. 47, 64). Cannon spoke to Meehan while Russo came up behind him (A. 47, 64). Cannon told Meehan that the police were investigating an *assault* and that the police were questioning all the young men known to have been in the neighborhood on the previous evening (A. 47, 64). During this confrontation, Meehan indicated to the police that he was on his way to keep an appointment at the unemployment office (A. 47, 64). Nevertheless, the three police officers took Meehan back to the station for further interrogation (A. 47, 64-65; I Tr. 127).[3]

Once at the police station, Detective Solari sat down facing Meehan (also sitting) to continue to question him (A. 47, 65). And while about one and a half feet away, the detective observed rust-colored stains on the defendant's sneakers (A. 47, 65). When Meehan was asked about the stain he responded that it might be mud from the pond where he had been swimming the previous

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[2]The trial court apparently found that Solari " . . . immediately left the . . . building by way of a window . . . . " (A. 46). A police officer testified that Solari "jumped out the window." (I Tr. 79). The trial judge, during the hearing on the motion to suppress, didn't "make any great point of whether he jumped or what he [Solari] did." I Tr. 80. Beneath the window, five feet below, was a cement sidewalk (I Tr. 117).

[3]Solari testified that Detective Cannon opened the door and *ordered* Meehan to come to the station. (I Tr. 141).

afternoon (A. 48, 65). Detective Solari suspected that the stain was blood and engaged Meehan in conversation to establish that it was, in fact, blood (A. 48, 65; I Tr. 129).

Detective Solari asked for the sneakers; Meehan complied, taking off the sneakers[4] and handing them over to the officer. At no time did Solari inform Meehan that he did not have to give him the sneakers (A. 69; I Tr. 130). The detective carried the sneakers to the police chemist for chemical examination and analysis and tests revealed that the stain was blood, although there is no indication in the record as to the time of the test, the date seems to be the same date that the sneakers were taken from Meehan (A. 65, V Tr. 605).

Sergeant Joseph Kelley, who had assumed that Meehan had been arrested on Hyde Park Avenue (I Tr. 77), read the *Miranda* rights to him and, in the presence of three other officers, initiated an interrogation which resulted in an inculpatory admission by the defendant to the police. The trial judge determined that the warnings were made "hurriedly and in the form of rote," indicative only of their being recited and heard (A. 51-52).[5] At no

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[4]There appears to be ambiguity in the record as to whether the sneaker is one, or both, sneakers. However, the Respondent suggests that the distinction, for purposes of the issues on certiorari, is *de minimus*.

[5]The trial judge, specifically found and ruled, *inter alia:*

> * * * The defendant's one-word responses to each of the said warnings were *recited* to Meehan and he *apparently* heard them. warnings were *recited* to Meehan and he *appareinly* heard them. I do not consider that this procedure, when it appears to have been done hurriedly and in the form of rote, is all that is required to consitute a waiver of these very vital rights of a defendant.* * * Such a rote reading of the 'Miranda card rights' makes what appears to be the ultimate line of protection of an individual involved in the most serious problem of his life almost a mere platitude and the reducing of the giving of the Miranda warnings to a mere ritual.* * * (A. 51-52)

The Respondent notes that the trial judge had before him the same transcript of the "confession" as is reproduced in the Appendix (A. 22-42). Also, the actual tape recordings of eight witness interviews, including the Respondent's "confession," were heard by the trial judge while he examined the transcripts. V Tr. 730, et seq.

time was the defendant told he could make a telephone call to his mother or anyone else.[6] He was not provided with an opportunity to seek advice or counsel (A. 26, 57, 76, 77).

With information, then, from the defendant's confession, the police later obtained a warrant to get possession of a pair of pants from the defendant's home (A. 77).[7] The pants were found and seized in the house where Meehan said they would be hanging when he made his statement (A. 59, 77-78).

In the afternoon of June 11, 1976, at about 3:45, when Joseph Meehan's mother and brother came to visit him at the District 5 station, they were first brought to the detectives' room where they were told about the alleged incident (A. 79; IV Tr. 485, 494). They

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[6]Massachusetts law with respect to the use of a telephone by a defendant in custody is unequivocal. A statute provides:

> The police official in charge of the station or other place of detention having a telephone wherein *a person* is *held in custody,* shall permit the use of the telephone, at the expense of the arrested person, for the purpose of allowing the arrested person *to communicate* with his family or friends, or to arrange for release on bail, or to engage the services of an attorney. Any such person shall be informed *forthwith* upon his arrival at such station or place of detention, of his right to so use the telephone, and such use shall be permitted within one hour thereafter. [Italics added.]

Mass. Gen. Laws, Ch. 276 §33A. And, the Massachusetts Court has ruled seriously upon this right established by statute. *Commonwealth v. Alicea,* 1978 Mass. Adv. Sh.2707,2711 n.11. See also, *Commonwealth v. Bouchard,* 347 Mass. 412 (1964); *Commonwealth v. Jones,* 362 Mass. 497 (1972).

[7]The affidavit in this case is reprinted in the Apendix at 17-19. The affiant recites, *inter alia,*

> . . . Joseph D. Meehan stated to the investigating officers that he did in fact kill Mary Ann Birks and the pants that he was wearing at the time of the incident are now located at his home . . . .

The lower court ruled that the petitioner, below, had proceeded upon the assumption that the warrant rests on the confession (A. 77). The Respondent makes the same assumption upon the matter before this Court.

were also told that Joseph had made a confession (A. 79; IV Tr. 485, 494). Sergeant Feeney and at least one other police officer accompanied the mother and brother to the cell and Feeney claimed that while in their presence he overheard a remark by Meehan: "Ma, I didn't mean to hit her so hard." (A. 58, 79). This was about three hours after the interrogation of Meehan by Sergeant Kelley (V Tr. 614).[8]

At about 5:20 p.m., on the same day, subsequent to his confession (so-called) to the police, and subsequent to his inculpatory remarks (the "three o'clock statement," so-called), and subsequent to the police taking of the sneakers and pants, Meehan spoke with an attorney, but only in the presence of a police guard (III Tr. 357, 394). At 9:00 p.m., the attorney returned and spoke with the defendant, again with the guard present and within the guard's earshot (III Tr. 399). At this very late point, Meehan's attorney first learned of the matter of drug ingestion and alcohol consumption by the defendant (III Tr. 399).

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[8]There is abundant testimony upon the record that Meehan was not allowed to be alone with his mother, or his brother, or his attorney (when he was finally able to contact one)/(A. 57, 58, 59; see, e.g., III Tr. 357, 403, 467). An attorney testified before the trial judge in this case that he was "absolutely not" allowed to be alone with Joseph Meehan at any time on June 11, 1976, and that he requested such opportunity on three separate occasions, and was "restrained physically" from accompanying the respondent into a police cell so that he could be alone with his client. III Tr. 402, et seq.

The mother of the defendant testified before the trial judge that she was not alone when she visited her son, and that a police officer was "a couple of feet . . . two or three feet" away from her. III Tr. 467. The mother also testified that a police detective was then "three or four" feet from the cell door. III Tr. 469.

Regulations of the Boston Police Department, apparently prohibiting private communications between a suspect situated as the respondent and his attorney and family, were admitted as evidence in the case and determined by the trial judge to not have been unreasonable (Exh. 23A, V Tr. 730; A. 58).

The defendant's attorney requested a blood test, after the attorney learned, for the first time, of the ingestion by the defendant of a substantial quantity of Valium and alcohol (III Tr. 400-402). The defendant was denied the opportunity for this test, though requested by his attorney, and at his expense (A. 57, et seq.; III Tr. 400, 402). At the hearing on the motion to suppress there was considerable testimony as to the defendant's sobriety, degree of withdrawal, and physical and mental condition at the time of the defendant's arrest and interrogation.

Additional facts will be discussed in the text of the Argument, where appropriate to the context.

SUMMARY OF ARGUMENT

I. The Massachusetts Supreme Judicial Court affirmed the order of a trial judge who had suppressed a "confession" (inculpatory admissions made during a tape recorded interrogation) because it was, in his view, both involuntary, and violative of *Miranda* v. *Arizona*, 384 U.S. 436 (1966) (the trial judge had heard more than twenty witnesses, during six days of trial, with twenty-four exhibits, some with multiple parts). The respondent argues that the lower court applied proper law to the relevant facts, and was correct in excluding the confession.

(a) The lower court determined that the confession was involuntary, and the court's decision was clearly based upon findings of coercion and involuntariness;

(b) The lower court discarded the secondary basis of the trial judge's determination, i.e., a *Miranda* violation, and noted that the *Miranda* violation in the case was simply *one* of the factors in the "totality" of the circumstances;

(c) The "totality of the circumstances" test is the proper test to be utilized in determing the involuntariness of a confession, and this was the test applied by the lower court to the facts of this case;

(d) The record clearly establishes a series of

misrepresentations made by the police interrogators to the respondent; similarly, promises and inducements were made to the respondent; improper influence was exerted upon the respondent; the respondent, during the interrogation, was suffering the consequences of intoxication; the respondent was youthful and inexperienced and "completely unprepared" to deal with the deceptive tactics of the police interrogator; and, the respondent was not advised of his right to use a telephone, this in violation of an explicit Massachusetts statute.

On the basis of the totality of the circumstances, viewed in the context of the law of this Court, the lower court was proper in affirming the trial judge's exclusion of the "confession" in this case.

II. The lower court properly excluded dungaree pants from evidence where the seizure of the pants was pursuant to a search warrant that rested upon an involuntary confession. An extensive line of cases from this Court establishes that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. And, although most of the cases have espoused this principle in the context of commentary upon the scope and validity of immunity statutes, the principle of law, and the language of the Court appear to be precisely on point, and current. *New Jersey* v. *Portash*, ____ U.S. ____, 99. S. Ct. 1292 (1979). Furthermore, there seems to be no inconsistency between the respondent's position in this regard and recent decisions of this Court which have refined progency of the *Miranda* case so as to allow some trial use of statements taken in technical violation of *Miranda*. In none of these recent cases has there been a claim or showing of an *involuntary* or *coerced* statement; rather, the cases involve technical violations of *Miranda*. The dungarees are the fruit of an involuntary confession and are, accordingly, directly prohibited by the Self-Incrimination Clause of the Fifth Amendment.

III. About three and one-half hours after the initial "confession" the respondent supposedly blurted out "Ma, I didn't

mean to hit her so hard." This statement was properly excluded from evidence by the lower court. The lower court determined that there were no "insulating" factors between the initial confession and the subsequent admissions, for the record discloses only that the respondent was merely kept in a cell in the meanwhile with absolutely no contact with the "outside world." As in *Darwin* v. *Connecticut*, 391 U.S. 346 (1966), there was no "break in the stream of events" to insulate the final inculpatory admission from what went on before. As in *Brown* v. *Illinois*, 422 U.S. 590 (1975), the fact that the respondent had made one statement, believed by him to mean he was "railroaded . . . to be convicted. . . . (A. 38)," with his anticipation of leniency, bolstered the pressure for him to make the second statement, or at least vitiated any incentive on his part to avoid further self-incrimination. The "three o'clock statement" was properly excluded from evidence.

ARGUMENT

I.

THE SUPREME JUDICIAL COURT PROPERLY AND CAREFULLY EXCLUDED FROM EVIDENCE A CONFESSION BECAUSE IT WAS INVOLUNTARY, AS DETERMINED BY THE STATE TRIAL JUDGE.

A. The Trial Court Determined That The Confession Was Involuntary, And The Supreme Judicial Court Affirmed On That Ground.

In the proceedings below, the Massachusetts Supreme Judicial Court reviewed the decision of a trial court on the respondent's motion to suppress certain statements and tangible evidence.

The decision of the trial court was based on a hearing which lasted six trial days. At that hearing, the judge heard testimony from more than twenty witnesses, including medical experts, and the respondent himself. In addition, the judge examined twenty-four exhibits, including transcriptions of taped interviews with the respondent and certain state witnesses.[9] The judge also listened to the recorded interviews themselves.

On the basis of this evidence, the trial judge ruled that the respondent's "confession" must be suppressed, as follows:

> 30. I, therefore, have found by way of conclusion that the entire statement taken by Sergeant Kelley . . . should be stricken on the grounds that it was neither voluntary nor was it carried out with the principles of the Miranda case in mind (A. 57).

On interlocutory review, the Supreme Judicial Court noted the dual foundation for the trial judge's judgment. That court, however, expressly focused its own decision and affirmance on a single ground, i.e., that the confession was involuntary:

> Referring to the factors of the defendant's youth, inexperience, and psychological condition induced by his drug and alcohol intake, the trial judge doubted seriously the effectiveness of the waiver of *Miranda* rights, but in his apparent view (*which we share*) the decision is better rested on *those and other factors which in combination rendered the confession involuntary* (A. 72, n.4). [Emphasis added.]

Likewise, in affirming the trial judge's determination that the dungarees must be suppressed as derivative of the involuntary confession, the lower court expressly maintained its reliance on involuntariness as the basis of its decision:

> There are cases in the Supreme Court suggesting that . . . evidence secured . . . by a violation of the prophylactic *Miranda* rule need not be excluded on any constitutional ground. [Citations omitted.] Those cases, however, do not reach the present, where the confession is *involuntary*. This distinction has been noted by the [Supreme] Court (A. 78). [Emphasis added.][10]

Finally, after a full review of the trial judge's decision with respect to the confession, the lower court concluded as follows: "We should not interfere with the judge's conclusion that the confession was *involuntary* and inadmissible." (A. 77). [Emphasis added.]

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[9]Three of the several exhibits are reprinted in the Appendix (A. 17, 20, 22); the actual tape recording of the defendant's "confession" was an exhibit before the state trial court and the lower court (and was apparently listened to by the lower court in making its determination) (A. 76); Exhibit 14 is the transcription which was made by the police of the taped interview and made a part of the record in the trial court and lower court (A. 22-43). The lower court explicitly stated its standard in reviewing the determination by the trial judge:

> . . . that there is a presumption against waiver of constitutional rights, and, with regard to the attitude owed by the reviewing court to the trial judge who rules on a motion to suppress, that it is for the judge to resolve questions of credibility; that his subsidiary findings are to be respected if supported by the evidence; that his findings of ultimate fact deriving from the subsidiary findings are open to reexamination by this court, as are his conclusions of law, but even so, that his conclusion as to waiver is entitled to substantial deference. [Citing] *Commonwealth v. Doyle*, ____ Mass. ____, n.6, 385 N.E. 2d 503 n.6 (1979).

[10]Elsewhere throughout its opinion, the lower court makes the ground of its decision clear. See, for example, the following statement:

> [T]he confession was involuntary and thus directly offensive to the Fifth Amendment (A. 77).

The peitioner points to the lower court's single citation of *Miranda v. Arizona* (Brief of Petitioner, p. 16; A. 72) and argues that this casts doubt, or ambiguity, as to the basis of the entire opinion. Respondent suggests that this is not the case. The lower court, in its citation, uses the introductory signal "see" (A. 72). The citation to *Miranda* apparently seeks to explain the legal basis of one of the *trial* court's "findings"; the lower court expressly disapproves of the trial court's *Miranda* finding, and expressly adopts the finding of involuntariness (A. 72); and there appears no other mention (other than in footnote 4) much less reliance upon, any violation of the defendant's *Miranda* rights anywhere in the lower court's opinion.

The respondent therefore suggests that there is no ambiguity as to the ground of the Supreme Judicial Court's decision. The trial court held the confession to be involuntary and the Supreme Judicial Court affirmed the exclusion on that basis.

B. The Lower Court Applied The Correct Voluntariness Criteria By Examining The Totality Of The Circumstances Surrounding The Confession.

In concluding that the confession was involuntary, the lower court examined, *inter alia*, the following factors:

—the circumstances of the respondent's initial detention and arrest;
—the nature and extent of the police interrogator's misrepresentation of facts;
—the implicit threats made during the interrogation;
—the nature and extent of promises, inducements, and improper influence by the interrogators;
—the respondent's youth, worldly inexperience, and impaired psychological and physical condition;
—the failure of the police to advise him of his right to use the telephone to contact family, friends or a lawyer; and,
—other circumstances of detention, including those after the taking of the confession.

The general standard for reviewing the admissibility of confessions has been developed in a long line of decisions by this Court.[11] Under that standard, a confession is only admissible if

[11]It appears that this Court's first decision dealing with the admissibility of confessions was *Hopt v. Utah*, 110 U.S. 574 (1884), in which the Court appeared to apply the common law test of reliability in assessing the admissibility of the confession. It appears that this Court first applied the Fifth Amendment to the question of coerced confessions, in *federal cases*, in *Bram v. United States*, 168 U.S. 532 (1897). It appears that this Court first applied the Due Process Clause of the Fourteenth Amendment to confessions, in *state cases*, in *Brown v. Mississippi*, 297 U.S. 278 (1936). The Fifth Amendment appears to first have been applied directly to the states through the Due Process Clause of the Fourteenth Amendment in *Malloy v. Hogan*, 378 U.S. 1 (1964).

There appear to be at least 100 other significant confession cases in the history of this Court. Reference is made to *Miranda v. Arizona*, 384 U.S. 436 (1966), *Michigan v. Tucker*, 417 U.S. 453 (1974), and *Mincey v. Arizona*, 437 U.S. 385 (1978), for any further historical background, as it appears that those cases adequately review the development and state of the law.

it was voluntary in the "totality of the circumstances." *Fikes* v. *Alabama*, 352 U.S. 191, 197 (1957); *Haynes* v. *Washington*, 373 U.S. 503, 513 (1963); *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 226 (1973). See *Mincey* v. *Arizona*, 437 U.S. 385, 401 (1978).[12]

Simply defined, voluntariness means the accused's "free choice to admit, to deny, or to refuse to answer." *Malloy* v. *Hogan*, 378 1, 7 (1964), citing *Lisbena* v. *California*, 314 U.S. 219, 241 (1941). And the totality of the circumstances means "*all* the surrounding circumstances—both the characteristics of the accused and the details of the interrogation." *Schneckloth* v. *Bustamonte, supra*, 412 U.S. at 226 [Emphasis added.] See *Fikes* v. *Alabama, supra*, 352 U.S. at 197. Significantly, this Court has noted that none of its cases dealing with coerced confessions "turned on the presence or absence of a single controlling factor; [rather,] each reflected a careful scrutiny of all the surrounding circumstances." *Id.* Further, the circumstances to be considered include not only events which precede the confession, but also events which occur after the confession is made. See *Haynes* v. *Washington, supra*, 373 U.S. at 514; *Spano* v. *New York*, 360 U.S. 315, 319-20, 322 (1959).

[12]The standard of review applied by this Court in examining state determinations of voluntariness may be summarized as follows: "[A]ll those matters which are usually termed issues of fact are for conclusive determination by the state courts and are not open for reconsideration by this Court." *Watts v. Indiana*, 338 U.S. 49, 50 (1949). This is because "the trial judge [is] closest to the trial scene and thus afforded the best opportunity to evaluate contradictory testimony." *Mincey v. Arizona*, supra, 437 U.S. at 408 (Rehnquist, J., concurring in part and dissenting in part). It is, of course, the duty of this Court "to examine the entire record and make an independent determination of the ultimate issue of voluntariness." *Davis v. North Carolina*, 384 U.S. 737, 741 (1966). However, without restraint, the reapplication of the totality test on review may amount to "no more than a substitution of [the Court's] view on a close factual question for that of the State courts." *Darwin v. Connecticut*, 391 U.S. 346, 350 (1968) (Harlan, J., concurring in part and dissenting in part).

The controlling test, as stated by this Court in the line of cases most closely in point, is as follows:

> If an individual's . . . confession was not *'the product of a rational intellect and a free will,'* his confession is inadmissible because coerced. *Townsend* v. *Sain*, 372 U.S. 293, 307 (1963) [emphasis added] citing *Blackburn* v. *Alabama*, 361 U.S. 199, 208 (1960).[13]

Stated another way:

> Is the confession the product of an essentially free and unconstrained choice by its maker. If it is, *if he has willed* to confess, it may be used against him. If it is not, if . . . his capacity for self-determination [has been] critically impaired, the use of his confession offends due process. *Culombe* v. *Connecticut*, 367 U.S. 568, 602 (1961) [Emphasis added], cited in *Lego* v. *Twomey*, 404 U.S. 447, (1972); *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 225-26.

C. The Totality Of The Circumstances In The Instant Case Amply Supports The Lower Court's Determination of Involuntariness.

The lower court made a careful and detailed examination of all the circumstances surrounding the confession. The Court began its review by examining the circumstances of the respondent's initial confrontation with the police (A. 67-68). Although the court determined that no arrest occurred until the accused was brought into the police station (A. 68), the court noted: (1) that the officers apprehended the accused on the street; (2) the officers *did not* inform him that he was free to go; and (3) the defendant was *alone* (there were three officers), was of slight build (5 foot, 6 inches, 135 pounds), and 18 years of age (A. 64-65, 67). The respondent suggests that these circumstances are clearly a part of the totality, and were properly considered by the lower court on the issue of the voluntariness of the confession, despite that

[13]See, also, *Mincey v. Arizona, supra,* relying, *inter alia,* upon both *Townsend v. Sain, supra,* and *Blackburn v. Alabama, supra.*

court's determination that there was no arrest at that time (A. 68, n. 3).[14]

The lower court then reviewed thoroughly the circumstances of the confession, beginning with an examination of the confession's content (A. 70-72). The court noted that Sergeant Kelley, an experienced interrogator, started by informing the accused that the victim was dead and that the accused was under arrest (A. 22). The court then proceeded to note carefully: (1) the subjects that were discussed by Kelley (e.g., blood, identification of the defendant and condition of the victim); (2) the methodology of the questioning (e.g., changing subjects, proceeding on "two lines" at once; and (3) the overall dynamic employed by the interrogator during the questioning (A. 23, et seq., 70-71). Further, the court specifically noted that the interrogator:

> —lied when he informed the respondent that he had been seen on the church steps by two witnesses (A. 27, 70);[15]
> —reinforced the deception by referring to the two witnesses at least seven times, and by asserting that they were both "positively sure" of the identification, reliable, and had

[14]The decision by the trial judge is dated August 5, 1977 (A. 60); the opinion of the lower court is dated March 19, 1979 (A. 62); this Court decided *Dunaway v. New York,* ___ U.S. ___, 99 S.Ct. 2248, on June 5, 1979. In *Dunaway* the defendant was "brought" to the police station under circumstances similar to those in the instant case, and made a confession, as did the respondent in the instant case. The respondent believes that it is significant that neither the trial judge nor the lower court had the advantage of the *Dunaway* decision at the time of the making of their own decisions on the question of the respondent's initial seizure or "arrest."

[15]There was only a single such witness. While it is true that witness Carroll identified the Respondent, the other witness, Ventola, later testified that he did not even know the Respondent "by name." III Tr. 373. The fact is that the "two" witnesses repeatedly cited by the police interrogator did not exist. See A. 72. Also, the lower court did not use the word "lie," but rather noted "police misconduct that cannot be termed inadvertant." (A. 80). And, more specifically, the lower court termed Kelley's statements as "deceptive" in that they mutually reinforced the alleged identification of the respondent (A. 73).

known the defendant for several years (A. 27-28, 70);
—further reinforced the deception by alleging that two other officers could confirm these identifications (A. 28, 70);[16]
—represented that "we [the police] are not holding you here on a little thread of evidence. We have a good case here." (A. 36, 70);[17]
—represented that he was "sure" that the truth would "help your defense" (A. 35, 71), and further, that "the truth is going to be a good defense in this particular case." (A. 36, 71);[18]
—though disclaiming any promises, clearly did promise that he would help the respondent with the court (A. 34-35, 71, 74);
—initiated the suggestion that the victim had provoked the incident (A. 36, 71);
—stressed the respondent's drunken condition as an extenuating factor (A. 35-37, 71);[19]

[16]Kelley said it was not incumbent on him to show these witnesses to the defendant, "but the defendant could confirm with Feeney and Madden that they talked to the witnesses." (A. 70). Both Feeney and Madden appeared to be present throughout the questioning of the respondent by Kelley (A. 22, 70, 71). The respondent suggests that their presence reinforces the coercive action of this particular misrepresentation by making the deception a joint effort, by implication, of all three police detectives.

Additionally, it appears that at least three other police officers (Madden, Feeney and Russo) were with Kelley throughout the course of the interrogation making, it is argued, the representations of Kelley, by adoption, the representations of all four police officers, still further enhancing the coercive potential of the deception.

[17]The respondent suggests that this representation is, initially, in the nature of a threat, which later becomes part of a promise, once "leniency" becomes the topic of the police questioning (A. 71).

[18]The police interrogator also misrepresented his own role in the scene, telling the respondent "We are here to help." (A. 34).

[19]As a matter of Massachusetts law, both now and at the time of the interrogation, intoxication is not a defense to crime in Massachusetts, and was clearly not even a matter for consideration in a defense of diminished mental capacity at the time of this interrogation. See *Commonwealth v. Sheehan,* 1978 Mass. Adv. Sh. 3029, 383 N.E. 2d 1115 (1978).

The lower court carefully analyzed these and other circumstances surrounding the "confession," relying in particular on six factors in affirming the trial court's finding that the confession was involuntary. Each of these factors is discussed *infra.*

1. *Misrepresentations.*

Both courts below considered the coercive effect of the interrogator's deceptions on the defendant. The trial judge, in reviewing the false statements with respect to the witnesses, noted that next "there follows several lines of ominous expressions, then a suggestion to the defendant to think it over . . . (A. 27, 54), and noted Sergeant Kelley's further assertion, "I am not trying to trap you in any shape or form" (A. 28, 54), made immediately after his seventh or eighth repetition of this falsehood.[20] Based on these and numerous other deceptions,[21] the trial judge concluded that in fact, "Sergeant Kelley succeeded, and to use his own term, in trapping the defendant . . ." into making the inculpatory statements (A. 56).

Petitioner suggests that the misrepresentation regarding the witnesses is minimal. Brief for Petitioner, at 26 n. 13. The Supreme Judicial Court, however, pointed out that the coercive impact of these statements was that they "repeatedly bracket[ed] two witnesses as having known the defendant for years and as giving direct, *mutually reinforcing* identifications." (A. 73) [Emphasis added.] The Court also went on to note that such statements, taken together with other remarks about the

[20]The interrogator made several similar disclaimers regarding his statements about the witnesses: "I don't know what to say to you, Joe. I told you all about what we had here. I told you about the witnesses . . ." (A. 34, 54); "I have told you about the witnesses. I have told you about that. I wasn't hiding anything. I came out with it." (A. 36,55).

[21]Those misrepresentations which were also in the nature of promises are discussed in the subsequent section entitled "Promises, Inducements and Improper Influence," *infra.*

"strength of the Commonwealth's 'case' served still further to give the impression that the case against the defendant was already proved." (A. 73)

The lower court concluded that although such misrepresentations would not be sufficient alone to show involuntariness, the trial judge could properly view them as "a relevant factor in considering whether the defendant's ability to make a free choice was undermined." (A. 73) Respondent suggests that the law of this Court plainly supports the lower court's position. *Frazier* v. *Cupp*, 394 U.S. 731, 739 (1969); *Spano* v. *New York*, 360 U.S. 315, 323 (1959); *Leyra* v. *Denno*, 347 U.S. 556, 559 (1954).

In *Frazier* v. *Cupp, supra*, this Court specifically held that a police officer's false statement to the defendant that his cohort had confessed was "relevant," though not itself sufficient, in the determination of involuntariness. 394 U.S. at 739. And although that confession was found voluntary in the totality of these circumstances, the defendant there was mature, with apparent worldly experience, and there was no evidence, as here, of intoxication, drug ingestion, or promises by the police.

In *Spano* v. *New York, supra*, this Court laid great emphasis on the misrepresentation by a police officer, a childhood friend of the defendant, that the defendant had "gotten him in a lot of trouble," and that the loss of his job, on defendant's account, would be "disastrous" to his family. 360 U.S. at 323. There, the confession was excluded under circumstances which included, as here, youth (25 years old), limited education (one-half year of high school), weakened condition, no prior criminal record, denial by the police of a phone call, and a false arousal of sympathy in the defendant comparable to the use of false empathy by the interrogator in the present case.

In *Leyra* v. *Denno, supra*, this Court expressed its clear disapproval of such deceptive practices, excluding a confession elicited by a police psychiatrist who was represented to a

weakened defendant as a doctor who had come to treat the defendant's headaches. 347 U.S. at 559-60. The respondent suggests that the transcript of the interrogation in that case, which is replete with misrepresentations about the role of the police ("We are trying to help you." *Id.* at 580), false promises ("We'll help you in every way possible." *Id.* at 571), false empathy ("Everybody likes you, everybody can make a mistake." *Id.* at 579) and suggestions of provocation ("You were very mad .... You were excited, you did it in a fit of anger." *Id.* at 570), bears a significant analytical similarity to the transcript in the present case.

For other cases demonstrating that misrepresentations by the police are a factor to be considered in determining the admissibility of a confession, see *Oregon* v. *Mathiason*, 429 U.S. 492, 495-96 (1977); *Procunier* v. *Atchley*, 400 U.S. 446, 448-49 (1971); *Rogers* v. *Richmond*, 365 U.S. 534, 541-42 (1961); *Miranda* v. *Arizona*, 384 U.S. 436, 448-56, 476 (1966); *Lisbena* v. *California*, 314 U.S. 219, 237 (1941).

2. *Promises, Inducements And Improper Influence.*

During the course of the questioning, the police interrogator made numerous assertions, in express terms, that a confession would "help" the respondent in the "defense" of the charge against him (A. 34-36). In addition to being false, i.e., affirmative misrepresentations of fact, it is obvious that such statements also amount to clear promises that the defendant would benefit by making a confession.[22] Further, these asser-

[22]It is important to note that promises of benefit really function as a double-edged sword in the hands of the police interrogator. That is, at least part of the "coercive nature of this tactic can be explained by the fact that it takes on the character of a threat;" and the same would appear to be true for the use of misrepresentations in this context. See White, *Police Trickery In Inducing Confessions*, 129 U.Pa.L.Rev. 581, 606 n.138 (1979).

tions become the more insidious, and the more compelling, in light of the interrogator's false statements about the role of the police in that moment ("We are here to help." A. 34); and, moreover, in light of his representations that he, personally, would take an active role in helping the respondent with the court ("What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant . . . was very cooperative." A. 34).

The petitioner suggests to this Court that "the police in this case made no promises." Brief For Petitioner, at 26. The respondent suggests that the transcript speaks for itself. Reproduced below is the lengthy "promise speech" made by Sergeant Kelley at a point *before* the respondent made any substantial inculpatory statements to the police. The transcript is continuous but is set off in block passages to illustrate the extent to which the interrogator spoke to the respondent "out of both sides of his mouth."

> Joe, from what you tell me right here now I can't promise you anything. I can't say I am going to do this or I am going to do that. I can't do that because it is not within my providence [sic], and I have no jurisdiction over anything like that.
>
> What I do in cases similar to this, I inform the court and anybody effective with the court, the District Attorney or anybody else, that the defendant, in the presence of Detective Madden, myself and Sergeant Feeney, that he was very co-operative, he told us the truth, he had a few things that weren't correct; he corrected himself on them, and he came out and he told us the whole truth. I can honestly say that he co-operated to the fullest. You realize the seriousness of it. What good it is going to do, to tell the truth, I can—the court is going to [41] be well aware of your truthfulness,
>
> but I can't say that you are going to get a break. I just can't do those things.

> I can tell you that the court, in the past experience, that the court looks upon these cases, where a guy tells the truth, a lot better than when we have to prove it the hard way, and that's all I can tell you. I will bring it to the attention of your attorney, the District Attorney, the local court judge and right up the line, for whatever develops out of it. The fact is all I can promise you is that I will tell the truth and the fact that you cooperated,
>
> but I can't promise you anything. I can't put it any fairer than that.
>
> We co-operate with the attorney. Insofar as the defense attorneys go, we give them anything that they want and we discuss it with them openly and freely. We don't hold anything back. If you wish to tell the truth of what happened, them I can say in all fairness it would probably help your defense; in fact, I am sure it would. So I hope that explains it
>
> that I cannot promise you anything now. I don't intend to kid you by saying yes. I will get you this or get you that. I just can't say that.
>
> I can bring it to the attention of everybody concerned. When I say that, I mean the District Attorney, the Judge and everyone else.
>
> That's all I can do.
>
> So if you wish to tell me about it, I will listen, and I promise you what I would do. I will say that in the past it has helped, others in the past. I have been around for a few years, and I have had a little experience along these lines.
>
> One thing, don't get the impression I am trying to con you, because I am not. What else can I say. Anything else you want to know? (A. 34-35).

The trial judge stated that the transcript of the interrogation was the "most telling" evidence before him (A. 53). After a detailed examination of the "promise speech" above, and a thorough review of the interrogator's other assertions (A.

53-55), the trial judge concluded that the confession was elicited by improper inducement.

> Sergeant Kelley indicated at different times that he was not trying to trick Meehan and he was not trying to con him, but I have come to the conclusion that the entire interrogation was very skillfully interwoven .... There were many references in the so-called statement of Meehan, as shown in the transcript, in which Sergeant Kelly was undertaking to create the appearance in the mind of Meehan that the Sergeant was a friend of his, was trying to help him, that if he admitted what he had done that it would assist him in his defense and in his case, and sprinkled throughout all these statements was the saving assertion that he couldn't promise him anything.... I have concluded that the defendant was incapable of competing with this type of assault upon his mind (A. 56-57).[23]

On review, the Supreme Judicial Court rested its own finding of promises and inducements on the certainty of benefit implied by the interrogator's statements. "What is prohibited ... is an *assurance,* express or implied, that it will aid the

[23]The petitioner takes issue with the trial judge's consideration of the facts that the interrogation was very skillful, and that the police asked leading questions, suggesting that this somehow reflects a view that all the safeguards of trial are applicable at the station house. Brief For Petitioner, at 32. Respondent's view is that this suggestion is somewhat exaggerated since it is clear to the respondent that the judge's objection was not to the skill of the interrogator, but to the content of his statements, i.e., containing misrepresentations, promises and elements of improper influence. Moreover, this Court has more than once looked to the mismatch of particular interrogators and suspects as one factor to be considered in the totality. See *Spano* v. *New York, supra,* 360 U.S. at 322:

> [The defendant] did not make a narrative statement but was subject to the leading questions of a skillful prosecutor in a question and answer session.

See also, *Watts* v. *Indiana,* 338 U.S. 49, 53 (1949) (defendant questioned by interrogator with twenty years experience as lawyer, judge and prosecutor).

defense or result in a lesser sentence."[24] (A. 74) [Emphasis added.] Thus, the interrogator first overstepped the permissible use when he told respondent that he was "sure" that a confession would "help your defense."

> The further remark that "the truth is going to be a good defense in this particular case" goes further and carries an intimation that the defendant would be *exonerated.* Especially is this thought conveyed, when in the immediate background is the idea that a crime, if it was committed, would be palliated by the victim's provocation and by the defendant's inebriated condition at the time. (A. 74) [Emphasis added.][25]

Thus, the lower court treated the interrogator's promises and inducements as another factor which may properly be considered in the totality of the circumstances. Respondent suggests that the law plainly supports the lower court's position. *Haynes* v. *Washington, supra,* 373 U.S. at 514; *Lynumn* v. *Illinois,* 372 U.S. 528, 534 (1963); *Leyra* v. *Denno, supra,* 347 U.S. at 560; *Bram* v. *United States,* 168 U.S. 532, 542-43 (1897).

In *Haynes* v. *Washington, supra,* this Court excluded a confession primarily on the ground that the police "promised" the defendant that if he "cooperated" and signed a confession, he would then be allowed to telephone his wife and an attorney.[26] 373 U.S. at 514. There, the only other ground for exclusion was the fact that the defendant had been detained for some time before the confession was made, and the defendant,

[24]Citing *Bram* v. *United States,* 168 U.S. 532 (1897), and other cases. See A.74, n.8.

[25]For a good example of another interrogator's suggestions to a susceptible defendant that the victim provoked the crime, and that his condition at that time would mitigate his responsibility, see *Leyra* v. *Denno, supra.*

[26]What the police stated to the defendant as a "promise" in this case was, of course, also a threat. See n. 22, *supra.*

notably, was neither young, nor intoxicated, nor lacking in experience with the law.[27]

In *Lynumn* v. *Illinois, supra,* the defendant's confession was excluded because of police promises of leniency if she cooperated, and threats that if she did not, her welfare benefits would be cut off, and her children taken away. Although the threats in that case were somewhat more explicit than here, it should be noted that the defendant there, like the respondent, had no prior experience with the law and, moreover, was in custody for only a short time prior to the confession.

In *Leyra* v. *Denno,* as noted *supra,* a police psychiatrist promised the defendant, in weakened condition, not only leniency but help as a friend. 347 U.S. at 559-60. In addition, as here, the interrogator improperly suggested that the defendant's condition at the time of the crime would mitigate his responsibility for those acts.

The classic statement of the prohibition against the use of promises and inducements in eliciting confessions appears in *Bram* v. *United States, supra.* In that case, an officer informed the accused that his shipmate had seen him kill the victim, and told him to name his accomplice in order that he would "not have the blame of this horrible crime on [his] shoulders." This Court ordered the confession excluded, holding that a confession, to be admissible,

> must be free and voluntary: that is, it must not be extracted by any sort of threats or violence, *nor obtained by any direct or indirect promises, however slight,* nor by the exertion of any improper influence. 168 U.S. at 542-43. [Emphasis added.]

The *Bram* doctrine is still good law. It was recently

[27]As to the facts of the defendant's background in *Haynes*, see 373 U.S. at 522 (Clark, J., dissenting).

reaffirmed by this Court in *Brady* v. *United States,* 397 U.S. 742 (1970), which dealt with the voluntariness issue in the context of a guilty plea. The Court's discussion of that case is fully applicable to the present case.

> *Bram* dealt with a confession given by a defendant in custody, alone and unrepresented by counsel. In such circumstances, *even a mild promise* of leniency was deemed sufficient to bar the confession, not because the promise was an illegal act as such, but *because defendants at such times are too sensitive to inducement* and the possible impact on them too great to ignore and too difficult to assess. 397 U.S. at 754 [Emphasis added.][28]

In the present case, the trial judge found that the interrogator used promises and other inducements, implied threats and improper influence in eliciting the confession from the respondent.[29] The Supreme Judicial Court agreed, and considered these tactics as one factor in affirming the trial judge's finding of involuntariness. In view of the cases cited the respondent submits that the judgment of the lower court is clearly supported by the law of this Court.

3. *Intoxication*

The respondent testified at the hearing that he was "dazed

[28]See also *Hutto* v. *Ross,* 429 U.S. 28 (1976), holding that where a defendant gives a confession knowing that an existing plea bargain will remain available whether or not he confesses, that confession is voluntary because not "the result of 'any direct or implied promises.' " 429 U.S. at 30 citing *Bram, supra.*

[29]As evidence that the interrogator's deceptive method was purposeful, see the self-serving disclaimers of voluntariness inserted for the record (in the form of questions) at the end of the interrogation, at A.40, 42. As this Court noted in *Haynes* v. *Washington, supra,* 373 U.S. at 601, "common sense dictates the conclusion that if the authorities were successful in compelling the totally incriminating confession of guilt, they would have little, if any, trouble securing the self-contained concession of voluntariness." See similar disclaimer in *Davis* v. *North Carolina,* 384 U.S. 737, 751-752 (1966).

and confused" at the time he was interrogated by the police[30] (A. 76, IV Tr. 543).

The trial judge heard extensive uncontradicted evidence from several witnesses regarding the ingestion by the respondent of a substantial amount of Valium drug and alcohol during the evening of June 10 and the morning of June 11, 1976.[31] In reaching his finding, the judge also considered medical testimony about the effects of such quantities of Valium and alcohol on the defendent (A.51). The trial judge found that at the time of the interrogation, the respondent was

> riding off a night and morning Valium and beer experience, with a degree of hangover a matter of disagreement between two doctor experts, with the dimness of his sense of judgment still hanging over him .... (A. 52).

On review, the lower court noted the expert testimony (obviously believed by the trial judge) as to the impaired judgment, memory and intellectual functioning of the respondent on the night of the incident and the morning of the interrogation (A. 75-76). The court also noted in particular that interrogator Kelley was fully aware of the respondent's drug and alcohol ingestion, and of his dazed condition, at a time *before* the respondent's inculpatory admissions (A. 71).[32] The

[30]See *Leyra* v. *Denno, supra,* 347 U.S. at 560 (confession excluded where defendant was in "dazed and bewildered condition"); *Mincey* v. *Arizona, supra,* 437 U.S. at 348 (same, "confused" condition). See also *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 229 (requiring consideration of a defendant's "possibly vulnerable subjective state").

[31]See, e.g., II Tr. 246, 255-258; III Tr. 421-424, 429; III. Tr. 449-450, 452-453; IV Tr. 518-519, 534-535, 540, 562-563. See also Affidavit of Joseph D. Meehan (A.13).

[32]See A.33: ("A. I got whacked out last night .... Q. All right. You were on downers? And you were drinking beer with one of the downers? A. They were valiums .... Q. So how many did you take—roughly? A. About 15.); A.35: ("Q. ... Are you still—A. High from last night, a little jiggy."); A.36: ("Q. What did you say again? A. High on the valiums and drunk, you know, a few six packs."). See also A.41.

lower court also listened to the tape of the interrogation as part of its review (A. 76).

The lower court concluded that the trial judge properly included in the totality of the circumstances his finding that the respondent's judgment was "dim" and "impaired" at the time of the interrogation. The respondent suggests that the law of this Court plainly supports the lower court's position. *Townsend* v. *Sain, supra,* 372 U.S. at 308; *Beecher* v. *Alabama,* 408 U.S. 234, 238 (1972); *Mincey* v. *Arizona, supra,* 437 U.S. at 396. See *Schneckloth* v. *Bustamonte, supra,* 412 U.S. at 227, 229.

4. *Youth And Inexperience*

At the time of the interrogation, the respondent was 18 years old. Both the trial judge and the lower court considered the respondent to be young (A. 76).

The respondent was also inexperienced. The respondent's mother testified that he had only been away from home by himself overnight on three or four occasions. She also testified that he had virtually never been out of the several Boston neighborhoods in which they had lived (IV Tr. 481-82). In addition, the respondent had limited schooling, a "poor educational background." (A. 76-77). And there was no evidence that he had ever had any previous experience with the police or the courts.

The trial judge noted that the respondent was "completely unprepared" to deal with the deceptive tactics of the police interrogator (A. 57). The lower court held that the trial judge properly considered the defendant's youth, inexperience and limited education in the totality of the circumstances (A. 76). The respondent suggests that the law of this Court plainly supports the lower court's position. *Payne* v. *Arkansas,* 356 U.S. 560 (1958) (youth: age 19); *Townsend* v. *Sain, supra,* 372 U.S. at 308 n.4 (inexperience and youth: age 19); *Spano* v. *New York, supra,* 360 U.S. at 322 (limited education: one-half year

of high school); *Lynumn* v. *Illinois, supra,* 372 U.S. at 534 (1963) (lack of experience with criminal law). See *Fare* v. *Michael C.,*____U.S.____, 99 S. Ct. 2560 (1979).[33]

G. Failure To Advise Of Right To Use Telephone

The petitioner here concedes the fact that the respondent was not advised by the police of his right to use a telephone to communicate with family or friends. Brief For Petitioner, at 25. This action by the police was in express violation of a Massachusetts statute.

This Court has consistently condemned police action which seeks to isolate a suspect from the outside world in order to increase the pressure on the suspect to confess. See *Miranda* v. *Arizona,* 384 U.S. 436, 449-50 (1966); *Rogers* v. *Richmond, supra,* 365 U.S. at 542-43; *Spano* v. *New York, supra,* 360 U.S. at 322-23. Moreover, in *Haynes* v. *Washington, supra,* this Court excluded a confession made by a defendant who had been denied his statutory right to use the telephone, and the Court's decision was based primarily on that fact, and the police promises and threats accompanying that denial. 373 U.S. at 514.

The lower court held that the failure of the police to advise the respondent of his statutory right to use the telephone was

[33]In the *Fare* v. *Michael C.* case, this Court determined that the lower state court should have determined the issue of waiver on the basis of all the circumstances surrounding the interrogation of the respondent, rather than a limited *Miranda* basis. This Court also noted that the juvenile, 16½ years of age, had had considerable experience with the police, with a record of several arrests, having served time and been on probation several years and, additionally, being under the full-time supervision of probation at the time of the interrogation. Also in *Fare,* there is no evidence or indication of deficient intelligence or trickery or deceit, as compared with the circumstances of interrogation in the instant case.

another factor to be considered in the totality of the circumstances (A. 77). The respondent suggests that the law of this Court plainly supports the lower court's position. *Haynes* v. *Washington, supra.*

The petitioner has premised its initial argument upon the assumption that the Massachusetts court, at least in significant part, rested its decision upon the finding of a technical violation of *Miranda.* Brief of Petitioner, at 16, et seq. In view of the respondent's position that involuntariness was the sole ground of the Supreme Judicial Court's decision, the petitioner's argument with respect to *Miranda* is not addressed further.[34]

The petitioner has premised the second portion of its second argument (II,B, at 24-30) upon the assumption that the Massachusetts courts merely considered a series of *non*-coercive factors in holding the confession involuntary. As the basis for this argument, the petitioner relies solely on *Procunier* v. *Atchley, supra,* which appears to distinguish between factors which constitute "actual coercion" and factors which merely establish a "setting" in which actual coercion might be exerted. See 400 U.S. at 453-54.

Even assuming that *Procunier* is applicable and governs here, the petitioner's argument must fail. It is true that under the distinction made in *Procunier,* the passive factors considered by the lower court (i.e., the defendant's intoxication,

[34]During the course of the interrogation, but prior to the inculpatory admissions, the interrogator asked: "Is there anything else, Joe, you would like to tell us?" And the defendant Meehan's response was "No." And, nevertheless, Sergeant Kelley proceeded right along with the questioning, ignoring what had just been stated to him by the defendant (A. 54). The respondent suggests that the question, his response, and the police officer's response to the defendant's response, though insufficient as a "trigger" to the *Miranda* prophylaxis, may nonetheless be relevant criteria in determining voluntariness of his inculpatory admissions.

youth, inexperience, and the failure of the police to advise him of his right to use the telephone) would be initially relevant only to establish the background potential for police coercion. However, the decisions of this Court clearly show that misrepresentations, promises, threats and improper influence are all factors which constitute actual coercion.[35] And given such actual coercion here, *Procunier* would then apply the background factors to determine (here, to increase substantially) the coercive weight of such misrepresentations, promises, threats and improper influence.

Moreover, if *Procunier* is to be reconciled with several of the more honored decisions of this Court, it can only be construed to mean that mere interrogation will suffice to constitute actual coercion where the defendant is in weakened or vulnerable condition, as here, and the background potential for coercion is therefore great. *Townsend* v. *Sain, supra; Blackburn* v. *Alabama, supra; Mincey* v. *Arizona, supra.*

In each of the cases cited above, this Court excluded a confession as involuntary because it was not "the product of a rational will and a free intellect." *Townsend* v. *Sain, supra,* 372 U.S. at 307; *Blackburn* v. *Alabama, supra,* 36 U.S. at 208; *Mincey* v. *Arizona,* 437 U.S. at 398. However, the only undisputed evidence in these cases which could now be taken to constitute actual coercion under *Procunier* is the evidence of police questioning itself.

For example, in *Townsend* v. *Sain, supra,* the defendant was, it is true, injected by the police doctor with "truth serum." The point of this use, however, is that the officers who subsequently interrogated the defendant *were not aware* of that fact. 372 U.S. as 299. In fact, the Court expressly pointed out that the issue of coercive police misconduct in this case was "irrelevant," *Id.*, at 309, holding that

[35]See cases cited in the sections entitled "Misrepresentations" and "Promises, Inducements and Improper Influence."

> Any questioning by police officers which *in fact* produces a confession which is not the product of a free intellect renders the confession inadmissible. *Id.*, at 308-09 [Emphasis in original.]

Likewise, in *Blackburn* v. *Alabama, supra,* the police questioned the defendant under the assumption that he was sane, but the resulting confession was excluded because, in fact, he was not. And although there are concededly other factors present in *Blackburn* which might be taken to constitute actual coercion, the factor principally relied upon by the Court was the mere questioning of the defendant while he was in a condition in which he lacked any meaningful "volition." See 301 U.S. at 211.

Finally, as recently as last Term, this Court again reaffirmed the notion that a confession, to be admissible, must be voluntary in fact. In *Mincey* v. *Arizona, supra,* the only coercive police action was the fact that the defendant was questioned while he lay wounded in a hospital bed. Notably, the *Procunier* case is not mentioned in the Court's opinion. The Court merely notes that the defendant's statements were not the "product of a rational intellect and a free will," citing *Townsend* v. *Sain, supra,* and *Blackburn* v. *Alabama, supra,* and goes on to hold that

> *Any* criminal trial use against a defendant of his *involuntary* statement is a denial of due process of law. 437 U.S. at 318.

It is therefore the respondent's position that *Procunier,* a case dealing mainly with the requirements of a federal habeas corpus petition, is somewhat of an aberration among this Court's cases on voluntariness. The essential requirement for voluntariness underlying all of the Court's other decisions in this context is the defendant's free will, and not "actual coercion." Moreover, as illustrated above, *Procunier* can only be reconciled with prior and subsequent decisions of this Court by construing the actual coercion requirement to be satisified by

interrogation alone where the defendant, as here, was in a weakened or vulnerable condition at the time of the interrogation. So construed, *Procunier* is satisfied in the present case. Moreover, as noted *supra*, it is clear that misrepresentations, promises, threats and improper influence of the sort practiced by the police interrogator in the present case would, in any event, constitute actual official coercion under *Procunier*.

Finally, the respondent would point out that despite the Court's recent emphasis on 1) the trustworthiness of the contested evidence, and 2) the deterrence of police misconduct, as criteria for deciding whether the exclusionary rule should be invoked in *other* contexts (see, e.g., *Michigan* v. *Tucker*, *supra*, dealing with a Miranda violation), these decisions have done nothing to alter the traditional criteria for determining involuntariness. In this context, it remains the law that 1) the truth or falsity of a confession is irrelevant, *Rogers* v. *Richmond*, *supra*, 365 U.S. at 540-41, see *Mincey* v. *Arizona*, *supra*, 437 U.S. at 398; and 2) with respect to deterrence,

> the constitutional inquiry is not whether the conduct of state officers. . .was shocking, but whether the confession was free and voluntary [in fact]. *Malloy* v. *Hogan*, *supra*, 378 U.S. at 7. See *Mincey* v. *Arizona*, 437 U.S. at 401.

In conclusion, the respondent submits that two lower Massachusetts courts, after painstaking analysis, have determined that the improper tactics employed by the police interrogator in this case were sufficient to deprive a vulnerable defendant of the free will necessary to make an admissible confession. In these circumstances, the respondent suggests that this Court's standards are clear. The judgment of the Massachusetts court must be affirmed on the ground that the respondent's confession was involuntary.

II.

THE STATE COURT PROPERLY EXCLUDED REAL EVIDENCE WHICH HAD BEEN SEIZED PURSUANT TO A SEARCH WARRANT THAT RESTED ON AN INVOLUNTARY CONFESSION.

The trial judge ordered suppressed certain pants ("dungarees") which the accused was allegedly wearing at the time of the incident (A. 59). The trial judge's rationale was simple:

> Inasmuch as the location of the pants was obtained as a result of the statement by the defendant to Sergeant Kelly [sic] which I have already suppressed, I rule that this warrant suffers by the same disability of illegality on that account and therefore the pants involved, as well as the underwear also obtained as a result of this warrant, are suppressed as well (A. 59).

The Massachusetts Supreme Court agreed that the warrant could not legalize the seizure of the dungarees on "the ground that the confession was involuntary and directly offensive to the Fifth Amendment." (A. 77). The lower court further noted its view that the reasons for excluding the product of a warrant based on an inadmissible confession are surely no less persuasive than those for excluding material seized in pursuance of a warrant supported by an affidavit infected by evidence that has been unlawfully seized (A. 78) [See Model Code of Pre-Arraignment Procedure, Commentary to §150.4 (1975)].

The respondent suggests that this Court has long recognized that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. In *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892), this Court examined the Self-Incrimination Clause in the backdrop of the local law of several states,[36] and noted:

[36]The Court explicitly noted the then state of the law in Arkansas, Georgia, California, Indiana, New York, New Hampshire, North Carolina, Massachusetts and Virginia. 142 U.S. at 584.

> It is a reasonable construction, we think, of the constitutional provision, that the witness is protected 'from being compelled to disclose the circumstance of his offence, *the sources from which*, or the *means by which, evidence of its commission, or of his connection with it, may be obtained*, or made effectual for his connection, without using his answers as direct admissions against him.' [citing] *Emery's Case*, 107 Mass. 172, 182 [1871].

142 U.S. at 585 [Emphasis added.]

In *Murphy* v. *Waterfront Commission of New York*, 378 U.S. 52 (1964), this Court held that a state witness may not be compelled to give testimony which may be incriminating under federal law unless the compelled testimony *and its fruit* cannot be used *in any manner* by federal officials in connection with a criminal prosecution against him. 378 U.S. at 79.[37] In *Kastigar* v. *United States*, 406 U.S. 441 (1972), this Court noted that the Fifth Amendment privilege against compulsory self-incrimination "protects against *any* disclosures that the witness reasonably believes could be used in a criminal prosecution *or*

[37]The Court went on to state:

> We conclude, moreover, that in order to implement this constitutional rule . . . the Federal Government must be prohibited from making *any* such use of compelled testimony *and its fruit*. 378 U.S. at 79. [Emphasis added.]

could lead to other evidence that might be so used." 406 U.S. at 445.[38] [Emphasis added.]

And, in *Lefkowitz* v. *Turley*, 414 U.S. 70 (1973) (in considering a New York statute that vitiated certain contract rights of persons who refused to testify before a grand jury), this Court stated:

> In any of these contexts, therefore, a witness protected by the privilege may rightfully refuse to answer unless and until he is protected at least against the use of his compelled answers *and evidence derived therefrom* in any subsequent criminal case in which he is a defendant. [Citation to *Kastigar* v. *United States, supra*] 414 U.S. at 78. [Emphasis added.]

And, in *United States* v. *Mandujano*, 425 U.S. 564 (1976) (in a separate opinion by Mr. Chief Justice Burger, in which Justices White, Powell and Rehnquist joined) there appears this view:

[38]In *Kastigar* the Court upheld the immunity statute against a challenge that mere use immunity is not coextensive with the Fifth Amendment's privilege:

> The privilege has never been construed to mean that one who invokes it cannot subsequently be prosecuted. Its sole concern is to afford protection against being 'forced to give testimony leading to the infliction of "penalties affixed to . . . criminal acts.' " Immunity from the use of compelled testimony, as well as evidence derived directly and indirectly therefrom, affords this protection. It prohibits the prosecutorial authorities from using the compelled testimony in *any* respect, and it therefore insures that the testimony cannot lead to the infliction of criminal penalties on the witness. 406 U.S. at 453. [Emphasis in original, footnote omitted.]

[Cited as authority in *New York* v. *Portash*, ____U.S. ____, 99 S.Ct. 1292, 1296 (1979)] See, also *Hoffman* v. *United States*, 341 U.S. 479, 486 (1951); *Blau* v. *United States*, 340 U.S. 159 (1950); *Mason* v. *United States*, 244 U.S. 362, 365 (1917).

> Immunity is the Government's ultimate tool for securing testimony that otherwise would be protected; unless immunity is conferred, however, testimony may be suppressed, *along with its fruits,* if it is compelled over an appropriate claim of privilege. 425 U.S. at 576 [Citation omitted; emphasis added.]

The respondent recognizes that each of these cases has to do with one or more statutes dealing with grants of immunity, the scope of immunity, or the consequences of immunity. Nevertheless, the respondent suggests that the law of this Court is clear that immunity is the essence of coerced testimony. *New Jersey* v. *Portash,* ____ U.S. ____, 99 S.Ct. 1292 (1979). And, upon the basis of *Counselman, Murphy, Kastigar, Lefkowitz, Mandujano* and *Portash,* the respondent states that this Court has recognized that the fruits of statements obtained in violation of the Self-Incrimination Clause are inadmissible. And the respondent suggests that the dungarees in this case are clearly fruits of a compelled, involuntary statement, and that their suppression is clearly required by existing law in an uninterrupted line of cases since 1892.

The petitioner claims that the Fifth Amendment exclusionary rule has no application to the proceeding in the instant case (application for a search warrant) or the evidence involved (the respondent's dungarees) and further argues that the application process is not a *trial* and that the dungarees are not *testimonial communication.* However, the respondent suggests that the petitioner's analysis appears to ignore the line of cases that commenced with *Counselman, supra;* the derivative evidence in these cases (the "fruits") is not restricted, even by implication, to exclude real or physical evidence. Additionally, the respondent does not object to the use of the compelled testimony in the application process for the search warrant, but, rather, the use of the "fruits" of his compelled statement at his eventual trial.

Schmerber v. *California,* 384 U.S. 757 (1966) and *Gilbert* v. *California,* 388 U.S. 263 (1967), do not support a contrary position. *Schmerber* is a case about a blood sample; *Gilbert* is a case about a handwriting examplar. Each is a case about a *physical characteristic,* having nothing to do with compelled *communication.* Neither of the cases are communication cases, although they are cases about government compulsion.[39] In neither *Schmerber* nor *Gilbert* is there anything concerned with actual communication from the mind of the suspect any more, really, than the number of his teeth or the pattern of his thumbprint. These are cases of identification characteristics, by comparison with the instant case, which is one of a coerced and involuntary confession, the use of compelled testimony or communication.

The petitioner also argues (Brief, p. 38 et seq.), that the instant case is not one appropriate for the application of the "fruit of the poisonous tree" doctrine because (1) there is no actual compulsion in this case, and that (2) under the circumstances of this case, a balancing test is both appropriate and permissible. The respondent disagrees inasmuch as (1) there is clearly advertent police misconduct in this case (actual coercion) as has been discussed in Argument I, *supra,* and (2) there is no precedent for a balancing test in the circumstances of this case, where the initial violation is a Fifth Amendment violation, as opposed to a technical *Miranda* violation.

In *New Jersey* v. *Portash,* ____U.S.____, 99 S. Ct. 1292 (1979), this Court was asked to "balance" as had been determined appropriate in *Harris* v. *New York,* 401 U.S. 222

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[39]And, the Court in *Gilbert* v. *California* also stated:

> The privilege reaches only compulsion of 'an accused's communications, whatever form they may take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers, ...' [citing] *Schmerber* v. *California,* 384 U.S. at 757.

388 U.S. at 266-67.

(1971) and *Oregon* v. *Hass*, 420 U.S. 714 (1975). However, the Court in *Portash* noted that *Harris* and *Hass* were cases of technical violation of the *Miranda* rule, with no *suggestion* in either case that the statements involved were involuntary or coerced. In *Portash* the Court stated:

> As we reaffirmed last Term, a defendant's compelled statement, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatsoever against him in a criminal trial. 'But *any* criminal trial use against a defendant of his involuntary statements is a denial of due process of law.'. . . [citing] *Mincey* v. *Arizona*, 437 U.S. 385. [Emphasis in original.] 99 S. Ct. at 1297.

The respondent's case is not a case of technical *Miranda* violation. The lower court did not decide the case on that basis, and, the respondent argues the issue is not before this Court. This is a case of an actually coerced confession in which the law is clear. *New Jersey* v. *Portash, supra; Mincey* v. *Arizona, supra.*[40]

[40]Recent cases of this Court further defining the law of confessions and the law of *Miranda* seem clearly distinguishable. In *Harris* v. *New York*, 401 U.S. 222 (1971) this Court explicitly noted that there was no claim made that the statements were involuntary or coerced. 401 U.S. at 224. (Additionally, *Harris* appears, in some respects, a case about the impeachment process, whereas the dungarees in the instant case have been excluded from the State's case-in-chief.) Also, respondent argues, *Harris* is a case of technical *Miranda* violation. *Michigan* v. *Tucker*, 417 U.S. 433 (1974) is similarly distinguishable. It, too, appears to be a case of technical *Miranda* deficiency (in a pre-*Miranda* questioning) where this Court noted explicitly that the record showed that the respondent's statements were not involuntary or the result of potential legal sanction. 417 U.S. at 444-45.

In *Oregon* v. *Hass, supra*, this Court noted that there was no evidence or suggestion that the statement was involuntary or coerced, and this case, too, appears to be one of *Miranda* redefinition. 420 U.S. at 722. In *United States* v. *Washington*, 431 U.S. 181 (1977) this Court noted explicitly that it was not a case where the "waiver of rights" form was involuntary and further, that it was "inconceivable" that the warning given in the case would fail to alert the defendant of his right to refuse to answer.

III.

THE LOWER COURT ACTED PROPERLY IN EXCLUDING THE "THREE O'CLOCK STATEMENT" FROM EVIDENCE

At approximately 3:45 in the afternoon, the respondent's mother and brother arrived at the police station to see the defendant. They were led to the detectives' room and were informed that the defendant had confessed the crime (A. 79). At least two police officers then accompanied the family members to the cell (A. 79). At this time the mother described the defendant as being " . . . in the cell like an animal with no shoes on . . .," (III Tr. 466) with eyes glassy and blurry, and stuttering, with slurry and incoherent speech (III Tr. 468). The brother testified that he was accompanied to the cell by *four* police officers (some in plain clothes) who refused the request, "Can I talk to Joey alone, please?" (III Tr. 495-96). The mother and brother were not allowed to be alone with the defendant (A. 57, 58, 79).

At this time the defendant appeared "really tired" and "very weak" with his face all drawn, with his eyes "drawn and bloodshot, glassy." (III Tr. 498). And, to his brother who had known him for eighteen years, the defendant appeared " . . . like he was high, that he was loaded." (III Tr. 497-98).

The record is apparently silent as to what, if anything, happened to Joseph Meehan between the time he was questioned by the police interrogators and the time that his mother and brother attempted to visit with him. All that appears is that the defendant was taken from the interrogation room and placed in a cell. He was not taken out of the police station. He was not brought for an appearance before a Magistrate. And he did not contact or consult with any friend, relative or attorney during this period (See A. 80).

Sergeant Feeney claimed that, as the mother and brother appeared, the defendant blurted out, "Ma, I didn't mean to hit her so hard." According to the defendant and his mother, he said only, "I'm sorry, Ma." (A. 79). Either statement is, it is suggested, an inculpatory statement corroborative of the confession.

The trial judge ruled the alleged statement admissible, holding that it was spontaneously made and unprompted by the police (A. 58). The lower court disagreed with the trial judge, noting a lack of factual support for the conclusion and a "misperception of the law" by the trial judge (A. 80); the lower court began with the premise that:

> . . . there is a strong basis both in logic and in policy for drawing the inference that the second confession was the product of the first, and for permitting that inference to be overcome only by such insulation as the advice of counsel or the lapse of a long period of time. (A. 80) [citing] *United States* v. *Gorman*, 355 F.2d 151, 157 (2d Cir. 1965), cert. den., 384 U.S. 1024 (1966).

The lower court then recognized that no factors which might have provided the "insulation" necessary to separate the "three o'clock statement" from the effects of the initial involuntary "confession" were present. Also citing *Brown* v. *Illinois*, 422 U.S. 590, and *Darwin* v. *Connecticut*, 391 U.S. 346 (1968) (Harlan, J., concurring in part and dissenting in part) (A. 80). The lower court analyzed the circumstances, noting in particular:

> —the short span of time between the first and second statement;
> —the same place (at the same station, in police detention);
> —the corroborative nature of the second statement when compared with the first;
> —the absence of consultation by the defendant with family; and,
> —the residual effects upon the defendant of earlier police deception and misconduct (A. 80).

The lower court also explicitly evaluated the criteria that had been applied by the trial judge (the alleged spontaneity and non-prompting by the police), and further noted its view that the earlier police misconduct "cannot be termed inadvertent." (A. 80). The lower court determined that there had been no "break in time or the stream of events" sufficient to disassociate the statement from the confession (A. 80).[41]

In *Lyons* v. *Oklahoma*, 322 U.S. 596 (1944), this Court considered a questioned confession which followed a previous confession which was given on the same day and which was, in that case, admittedly involuntary. 322 U.S. 597. At the time of the confessions in the case, this Court noted that the defendant was 21 or 22 years of age, with no indication of a sub-normal intelligence, and with a previous (but minimal) criminal record. 322 U.S. at 599. He had not been represented by counsel until a point subsequent to the confessions. 322 U.S. 599. The defendant was visited by wife and family between the time of arrest and the time of the first confession. 322 U.S. 599.[42]

This Court noted that the federal question in the case is whether the second confession was given under such circumstances that its use as evidence at the trial constitutes a violation of the due process clause of the Fourteenth Amendment. 322 U.S. at 601. And this Court held that the question of whether the later confession is itself voluntary depends on the inferences

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[41]This evaluation by the Massachusetts court was hardly a novelty to that court. See *Commonwealth* v. *Haas*, ____ Mass. ____, 1977 Mass. Adv. Sh. 2212, 2223; *Commonwealth* v. *Mahnke*, 368 Mass. 662 (1975), cert. denied 425 U.S. 959 (1976).

[42]There appears to be contradictory evidence as to whether or not Lyons had been subjected to violence and threats of further harm unless he confessed. 322 U.S. 599. Lyons made an oral confession at one point, then a subsequent oral confession that was reduced to writing. 322 U.S. 600.

as to the continuing effect of the coercive practices which may fairly be drawn from the surrounding circumstances. 322 U.S. at 602, citing *Lisenba* v. *California,* 314 U.S. 219 (1941). The Court said, *inter alia:*

> * * * The admissibility of the later confession depends upon the same test—is it voluntary. Of course the fact that the earlier statement was obtained from the prisoner by coercion is to be considered in appraising the character of the later confession. The effect of earlier abuse may be so clear as to forbid any other inference than that it dominated the mind of the accused to such an extent that the later confession is involuntary. * * * 322 U.S. 603.

This Court, in *Lyons,* then related other circumstances with respect to Lyons' second admission and noted, among other things, that Lyons had made the second confession while being under circumstances which apparently indicated no reason for him to fear mistreatment and other indicia of voluntariness including familiarity of surroundings and evidence that there was no further force of threat. 322 U.S. at 604-05.

In *United States* v. *Bayer,* 331 U.S. 532 (1947), the suspect made a first confession under circumstances of confinement where he was denied callers, communication, comforts and facilities. 331 U.S. 539. Without more, this Court assumed this first confession to be inadmissible under the rule of *McNabb* v. *United States,* 318 U.S. 332 (1942). 331 U.S. at 539-40. A second confession was made about six months later, which this Court held to be admissible, noting that detention had been all but eliminated, and that the defendant had been explicitly warned that the second statement might be used against him. 331 U.S. at 540-41. However, in the course of deciding, the Court made the following statement:

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, he is never thereafter free of the psychological and practical disadvantages of having confessed. He can never get the cat back in the bag. The secret is out for good. In such a sense, a later confession always may be looked upon as fruit of the first. 331 U.S. at 540.[43]

In *Leyra* v. *Denno,* 347 U.S. 556 (1954), this Court considered subsequent confessions given by the accused in rapid succession, immediately following a confession obtained through mental coercion, all within a period of about five hours, under circumstances in which the accused appeared physically and emotionally exhausted, and not protected by counsel.[44]

In the *Leyra* case, this Court noted that the questioner, time and time and time again, told the petitioner how much he wanted to and could help him. 347 U.S. at 559. The questioner also told the petitioner how much better he would feel and how much lighter and easier it would be on him "if he would just

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[43]The Court explicitly noted that the second confession in this case was made *six months* after the first; that the only restraint under which base the defendant then labored was that he could not leave an Army base without permission. 331 U.S. at 541.

[44]The actual confession in the *Leyra* case is reprinted as an appendix to the Opinion of the Court. 347 U.S. at 562, et seq. The respondent in this case asks the Court to note the remarkable similarity in the questioner's dynamic when the *Leyra* transcript is compared to the transcript of the "confession" in this case. Particularly noteworthy is the fact that the questioner touched the suspect; that the questions were frequently leading questions; that the answers were frequently monosyllabic; that there were intermittent suggestions of reward and inducement; and that there appears an empathy by the questioner to the suspect.

unbosom himself. . . ." 347 U.S. at 560.[45]

This Court, in *Leyra,* noted that the "formal confession" taken several hours after the initial interrogation and inculpatory admissions, were "so close that one must say the facts of one control the character of the other. . . ." 347 at 561. This Court noted that all of the inculpatory admissions were simply part of one continuous process, within a period of about five hours, as the climax of the interrogation of a physically and emotionally exhausted suspect. 347 U.S. at 561.

In *Darwin* v. *Connecticut,* 391 U.S. 346 (1968), the petitioner had made multiple confessions, and the first three had been excluded by the trial judge. This Court, in excluding the fourth confession and a partial re-enactment of the crime (staged at the request of the police), noted that the petitioner had been kept incommunicado and that there was "no break in the stream of events" from arrest throughout the concededly invalid confessions . . . to the confession and reenactment . . . 'sufficient to insulate' the final events 'from the effect of all that went before.' " 391 U.S. at 349, citing, *Clewis* v. *Texas,* 386 U.S. 707 (1967), and *Beecher* v. *Alabama,* 389 U.S. 35 (1967).

[45]Yet the doctor [questioner] was at that very time the paid representative of the state whose prosecuting officials were listening in on every threat made and every promise of leniency given. 547 U.S. at 560.

It is also interesting to note that in *Leyra,* a tape recording of the interrogation was made and a transcription of the interrogation was available in the record. This Court noted, as did the trial judge in an instant case, that the petitioner's answers indicate a mind dazed and bewildered. This Court also noted, as did the trial judge in the instant case, of certain complaints made by the petitioner during the course of the interrogation. 347 at 560. Finally, this Court, in its opinion in *Leyra,* noted that the petitioner's answers were barely audible and that the record indicates that the petitioner began to accept suggestions of the interrogator. 347 U.S. at 560.

In *Brown* v. *Illinois,* 422 U.S. 590 (1975), the petitioner had been arrested under circumstances indicating that the arrest was investigatory, and made two in-custody inculpatory statements after he had been given the *Miranda* warnings. 422 U.S. at 591. As in the instant case, at the time of initial confrontation between police and suspect, the suspect was advised that he was suspected for the commission of a crime and he was escorted to a police car. 422 U.S. at 593. In both cases, the suspect was taken to a police station and interrogated. 422 U.S. 593-94. In each of the cases, the suspect was given *Miranda* warnings. 422 U.S. at 594; in each of the cases, the suspect answered questions put to him by the interrogator, 422 U.S. at 594; and, in each of the cases, the suspect made a second statement corroborative of the first. 422 U.S. at 595.[46] This Court noted that Brown's second statement was clearly the result and the fruit of his first statement (422 U.S. at 605 n.12), and stated:

> The fact that Brown had made one statement, believed by him to be admissible, and his cooperation with the arresting and interrogating officers . . . , with his anticipation of leniency, bolstered the pressures for him to give the second, *or at least vitiated any incentive on his part to avoid self incrimination.* [Citation omitted, emphasis added.] 422 U.S. at 605 n. 12. [Emphasis added.]

In summary, the prior decisions of this Court clearly show that where an initial inculpatory statement is involuntary, as here, any subsequent inculpatory statement must be excluded unless there was some significant "break in the stream of events . . . 'sufficient to institute' the [latter statement] from the effect of the [former]." *Darwin* v. *Connecticut, supra,* 391 U.S. at 349. This is so regardless of whether the second statement was made under the continuing influence of the coercion which produced the first, see *Leyra* v. *Denno, supra*; or whether the second statement was made under the assumption that "the cat

[46]In *Brown,* the second statement was apparently made about four and one-half hours after the first. 422 U.S. at 595-96.

was already out of the bag," and there was nothing left to lose, see *United States* v. *Bayer*, *supra*. Moreover, the burden is properly placed on the prosecution to show not only the absence of continued coercion at the time of the second statement, but also the lack of causation between two statements. *Darwin* v. *Connecticut*, *supra*, at 351 (Harlan, J., concurring in part and dissenting in part).

In the present case, there were simply no intervening events sufficient to insulate the second statement from the first. Apparently, all that happened in the three hours between the two statements was that the defendant remained in detention at the police station. Indeed, the condition of the defendant was, if anything, worse at the time of the second statement than at the time of the first. The three o'clock statement therefore must be excluded as a product of the first, and as a product of the same coercion.

CONCLUSION

The lower court decision is correct. The initial confession was properly excluded because it was coerced and involuntary, in the totality of the circumstances. The lower court applied the correct criteria to factual determinations that are either uncontroverted or clearly warranted from the record. The dungarees were properly suppressed as the fruit of a direct violation of the Self-Incrimination Clause, and, alternatively, if there is any change in the law in this regard, the pants should be admissible for purposes of impeachment, only. The second inculpatory admission was properly suppressed because it was inextricably connected with the first statement, which was coerced and clearly involuntary. The absence of intervening circumstances

sufficient to insulate the second statement from the first requires suppression of the second. The findings, rulings and order of the Massachusetts Supreme Judicial Court should be affirmed.

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[47]Counsel acknowledge, with gratitude, the assistance of Eric S. Brandt and James E. O'Connell, Jr. of the Northeastern University School of Law, at Boston.

In the
Supreme Court of the United States.

OCTOBER TERM, 1979.

No. 78-1874.

COMMONWEALTH OF MASSACHUSETTS,
PETITIONER,
v.
JOSEPH MEEHAN,
RESPONDENT.

ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

Reply Brief of the Petitioner.

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ON WRIT OF CERTIORARI TO THE SUPREME JUDICIAL COURT OF THE COMMONWEALTH OF MASSACHUSETTS.

I. IN THE ABSENCE OF FLAGRANT POLICE MISCONDUCT CONSISTING OF ACTUAL COERCION, APPLICATION OF THE EXCLUSIONARY RULE SHOULD BE RE-EXAMINED.

Respondent relies upon a series of cases[1] in which actual coercion has been found to support his position that the confes-

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[1] *Spano* v. *New York*, 360 U.S. 315 (1959); *Haynes* v. *Washington*, 373 U.S. 503 (1963); *Leyra* v. *Denno*, 347 U.S. 556 (1954); *Lynumn* v. *Illinois*, 372 U.S. 528 (1963).

sion and its fruits must be suppressed. These cases are distinguishable.

Both *Spano* and *Haynes* involved prolonged, isolated interrogation, in which official pressure in the form of specific denial of retained counsel (*Spano*) or refusal to allow suspect to speak with his wife (*Haynes*) were found. Most importantly, in both cases the court noted that the interrogation was not employed in merely trying to solve a crime, but that the police acted with "undeviating intent" to extract a confession. *Spano* at 324; *Haynes* at 511, n.8. In *Leyra*, the defendant was questioned for several days by the police and then by a psychiatrist with "considerable knowledge of hypnosis." The court, in holding such interrogation coercive noted (at 559-560) the effect of such techniques as rendering the suspect dazed and bewildered.[2] Finally, the court in *Lynumn* found that direct threats to the defendant that her welfare benefits would be cut off and her children taken away were coercive. 372 U.S. at 537. However, the only questionable assertion on the part of police in the instant case was the suggestion that "the truth is going to be good defense in this particular case" (A. 36). If this suggestion could be deemed to have induced the confession, the Commonwealth suggests that inquiry should not end.

The respondent states that the controlling test is whether the individual's confession was the product of a rational intellect and a free will; if not, it is inadmissible. However, viewed objectively, it is most difficult to demonstrate how the defendant has been deprived of his ability to choose whether to confess or not. Indeed, even in the most egregious case, (see e.g. *Brown* v. *Mississippi*, 297 U.S. 278 [1936]), the suspect retains the

[2] It is suggested that it is only in such a case wherein hypnotism or truth serum, *Townsend* v. *Sain*, 372 U.S. 293, 307 (1963), is utilized that the "overborne will" test of voluntariness has any meaningful application. For only under such conditions is the individual deprived of the opportunity to make choices.

choice of confessing rather than continuing to sustain brutal abuse. It is therefore suggested that the test should take into account the purpose of excluding "compelled" confessions and, it is submitted, that purpose is two-fold: to deter flagrant and fundamentally unfair police misconduct and to protect the integrity of the trial. In the instant case, the police conduct was not flagrantly or blatantly coercive. If the focus is on the integrity of the trial, then it seems not inappropriate to at least consider whether the interrogational procedures were such as would likely produce a false confession. Here, the inducement, if any, was a suggestion that it is better to tell the truth. It seems far-fetched to conclude that such a statement would induce someone to speak falsely.

It is therefore submitted that the confession in the instant case cannot as a matter of constitutional law be deemed "compelled." Further, it is suggested, the suppression of the confession operates to deny the trier of fact trustworthy evidence.

II. The Fifth Amendment does Not Require Exclusion of Real Evidence Seized Pursuant to a Search Warrant Based in Part on Statements Which are Inadmissible at Trial.

The respondent bases his claim that suppression of derivative evidence is absolutely required by the Fifth Amendment on a series of cases commencing with *Counselman* v. *Hitchcock*, 142 U.S. 547 (1892). These cases consider the scope and requirements of the privilege in its natural context:

> The exemption from testimonial compulsion, that is, from disclosure as a witness of evidence against oneself, forced *by any form of legal process*, is universal in American law, though there may be differences as to its

exact scope and limits. *Twining* v. *New Jersey*, 211 U.S. 78, 91 (1908). (Emphasis supplied.)

In such a formal setting, a grand jury proceeding, the court in *Counselman* held that a claim of the privilege asserted against the giving of sworn testimony, compelled under the threat of imprisonment for contempt, could not be overridden by a statutory grant of immunity limited to testimonial use of the compelled statements and not prohibiting derivative use. Without argument or explanation, respondent extends this holding to the materially different context of informal police interrogation. The Commonwealth submits that neither the express terms of the Fifth Amendment privilege[3] nor the policies which this court has recognized as underlying that privilege support or justify such an extension.

The policies or values underlying the privilege, in its traditional context, are comprehensively set forth in *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52, 55 (1965):

> The privilege against self-incrimination "registers an important advance in the development of our liberty — 'one of the great landmarks in man's struggle to make himself civilized.'" *Ullman* v. *United States*, 350 U.S. 422, 426. It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury, or contempt; our preference for an accusatorial rather than an inquisitorial system of criminal justice; our fear that self-incriminating statements will be elicited by inhumane treatment and abuses; our sense of

[3] See *Brief of the Commonwealth* at 36.

> fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load." 8 Wigmore, Evidence (McNaughton rev. 1961), 317; our respect for the inviolability of the human personality and of the right of each individual "to a private enclave where he may lead a private life," *United States* v. *Grunewald*, 233 F.2d 556, 581-582 (Frank, J. dissenting), rev'd 353 U.S. 391; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent." *Quinn* v. *United States*, 349 U.S. 155, 162.

Analysis of these policy considerations reveals scant implication with informal police interrogation.

First, in the context of police interrogation a suspect is not confronted with the "cruel trilemma of self-accusation, perjury or contempt." He is not under oath; the decision to remain silent cannot expose him to contempt nor can a false statement expose him to an additional charge of perjury.

Second, there is no invasion of privacy such as is involved in a grand jury or legislative committee hearing where a witness is required to appear without any prior demonstration of probable cause that he has committed an offense. Here there can be no dispute that there was sufficient evidence-identification of the defendant with the victim and his blood-stained sneakers to constitute probable cause for his arrest. Therefore, in the police interrogation context, the government has sustained its burden of showing "good cause" for "disturbing" an individual.

Third, the concern that compelled testimony may be untrustworthy or "our distrust of self-deprecatory statements"

does not extend to use of derivative evidence for that evidence still must be linked to the defendant by evidence independent of his inadmissible statements. The difference in the application of the privilege to compelled testimony and to derivative evidence has been aptly stated by Judge Friendly:

> Although many citizens devoted to the Bill of Rights may not agree that a "fair state-individual balance" requires the government "to shoulder the entire load" in the investigation as it does in the prosecution of crime, few will deny that one innocent man sent to his death or to a long prison term because of a false confession is one too many. There is thus good reason to impose a higher standard on the police before allowing them to use a confession of murder than a weapon bearing the confessor's fingerprints to which his confession has led; doubtless this is the reason why fruits of a confession "not blatantly coerced" are admitted in England, India, and Ceylon, countries on whose experience the *Miranda* opinion relied. *Benchmarks* (1967) at 282.

It is suggested that not all compulsion renders derivative evidence inadmissible, but only that which is blatant, flagrant, or offensive to some deeply rooted concept of fairness, i.e., practices such as are universally condemned. In the instant case, the only questionable conduct on the part of the police was the suggestion that cooperation and truth would work to the respondent's benefit. However, these remarks were not made in a threatening manner and were far from coercive. See *Fare* v. *Michael C.*, ____ U.S. ____, 61 L.Ed. 2d 197 (1979).

Finally, the value consideration underlying the privilege which is reflected in the policy that "the government in its contest with the individual . . . should shoulder the entire

load" and the "preference for an accusatorial rather than an inquisitorial system" while implicated in permitting use of derivative evidence obtained through police interrogation, are not absolute bars to the use of such evidence. It is well-settled that individuals may be compelled to furnish non-testimonial though possibly incriminating evidence. See, e.g., *Schmerber* v. *California*, 384 U.S. 757 (1966) (blood samples); *Gilbert* v. *California*, 388 U.S. 263 (1967) (handwriting exemplars); *United States* v. *Dionisio*, 410 U.S. 1 (1973) (voice exemplars).

Moreover, our preference for an accusatorial rather than an inquisitorial system reflects, it is suggested, a desire to keep separate the judicial function and the investigative function. It does not create an absolute bar to investigative procedures which could well be labeled inquisitorial, for example, investigative grand juries, under-cover surveillance, and electronic eavesdropping (conducted under proper authorization).

It is therefore submitted that the values underlying the privilege which have led to the principle that no testimony or evidence derived therefrom which is compelled by legal process in the context of judicial or legislative hearings are not applicable to informal police interrogation. The respondent has advanced no basis for extending the *Counselman* holding. Moreover, even in the context of official proceedings, the bar against the use of compelled testimony in further proceedings is not absolute. *United States* v. *Wong*, 431 U.S. 174, 180 (1977) (Fifth Amendment testimonial privilege does not condone perjury.) See also, *United States* v. *Mandujano*, 425 U.S. 564 (1976).

Conclusion.

For the reasons stated in its brief and in this reply brief, the Commonwealth respectfully requests this court to reverse the judgment of the court below.

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